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COURT OF APPEALS, DIVISION II STATE OF WASHINGTON

CASE NO. 49963-1-II

ANNETTE ATKINSON, a Washington Resident, et. al.,

Appellee,

VS.

BRIAN ROSE and JANE DOE ROSE, and their marital community, et. al,

Appellants.

APPELLANTS' APPELLATE BRIEF, RAP 10

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APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

With this Appeal, Appellant Brian Rose seeks review of the trial court's denial of his motion to compel private arbitration pursuant to a private arbitration agreement found in the operating agreement for Woohoo Enterprises, LLC executed by Brian Rose and his business partner, Annette Atkinson. Rose sought to enforce the private arbitration clause because Atkinson's second and third causes of action relate specifically to the power dynamic between Rose and Atkinson as members and co-managers of Woohoo Enterprises, LLC. Specifically, Paragraph 5.5(a) of Woohoo Enterprises' Operating Agreement states that if the members encounter a deadlock regarding the business's activities, they must either mediate or arbitrate the dispute. Accordingly, the trial court committed reversible error when it determined that the arbitration clause did not apply to Atkinson's claims and that Rose had waived his right to arbitration.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

- Upon Motion to Compel Arbitration brought by Appellant, the trial court, Honorable
 Leila Mills, erred in denying Appellant's Motion to Compel Private Arbitration and Stay
 Proceedings.
- Upon motion for reconsideration brought by Appellant, the trial court, Honorable Leila
 Mills, erred in denying Appellant's Motion for Reconsideration.

B. <u>Issues Pertaining to Assignments of Error</u>

1. Issues Pertaining to Assignment of Error No. 1:

Upon a Motion to Compel Private Arbitration, brought by Appellant, was it error for the trial court, Honorable Leila Mills, to deny Appellant's Motion to Compel Private Arbitration and Stay Proceedings?

Appellant asserts: "YES."

2. Issues Pertaining to Assignment of Error No. 2:

Upon a Motion for Reconsideration, brought by Appellant, was it error for the trial court, Honorable Leila Mills, to deny Appellant's Motion for Reconsideration?

Appellant asserts: "YES."

III. STATEMENT OF APPEALABILITY

This appeal is from the order of the Kitsap County Superior Court and is authorized by Washington Rules of Appellate Procedure 2.2(a)(3), 3.1, and 4.1(b)(2).

IV. STATEMENT OF THE CASE

A. Factual Background

Broadly speaking, this lawsuit concerns the business partnership between Brian Rose ("Rose"), Annette Atkinson ("Atkinson"), Michelle Beardsley ("Beardsley"), and Cheryl Jester ("Jester") (collectively "the Partners") to own and operate retail marijuana stores in the greater Kitsap County area. After Washington voters legalized recreational marijuana, the Partners collectively agreed to work together to obtain recreational marijuana licenses and operate stores in Kitsap County.

To operate one of the retail stores, Rose and Atkinson purchased a property that would meet the zoning requirements in the Bremerton area.² Rose and Atkinson formed Woohoo Enterprises, LLC as the legal entity to hold the property.³ Woohoo Enterprises, LLC purchased the property located at 1110 Charleston Beach Road West, Bremerton, WA.⁴ When Rose and Atkinson formed Woohoo Enterprises, LLC, they also executed an LLC operating agreement.⁵ Rose and Atkinson are the sole members (each owning a 50% membership interest)⁶ and co-

¹ See Generally CP 634-654.

² CP 225 at ¶ 3.

³ Id. at \P 4.

⁴ Id.

⁵ <u>Id.</u>; see also CP 229-42.

⁶ CP 230.

managers of the LLC. Article V of the Operating Agreement discusses member voting. Paragraph 5.5(a) states that "Deadlock occurs when members, after negotiations, cannot reach an agreement. At such time members agree to:

- a. enter binding mediation or arbitration.
- b. If there is failure to reach an agreement through arbitration or mediation, members may file a request for decision by the appropriate court..."9

The Partners agreed that the first store they opened, High Washington, LLC, would operate at the Charleston Beach location. As a result, High Washington, LLC executed a lease with Woohoo Enterprises, LLC. 10 For tax reasons, the rent that High Washington, LLC paid Woohoo Enterprises was below market. 11 After High Washington, LLC opened its doors to the public, the business relationship between Rose and Atkinson became strained. Rose began to suspect that Atkinson was misusing funds and approached his banker to determine what, if anything could be done to block her ability to wantonly spend Woohoo Enterprises funds.¹³ During this period of time Atkinson forbade Rose from entering High Washington, LLC. Rose also made an attempt to increase the rent High Washington, LLC paid to Woohoo Enterprises, LLC.

Atkinson's second and third causes of action relate specifically to the power dynamic between Rose and Atkinson as equal members of Woohoo Enterprises, LLC. Atkinson requested that the Court remove Rose from the management and daily operations of Woohoo Enterprises, LLC. In doing so, Atkinson is seeking to invoke Article I, Paragraph 7 ("Dissociation of an Owner") of Attachment A to Woohoo Enterprises' LLC Operating Agreement. ¹⁴

After Atkinson and Rose's disputes began to escalate, 15 the parties, through counsel, began to discuss a means by which to resolve their dispute. 16 Initially, Rose thought the parties were

⁷ CP 231.

¹⁰ CP 166-73.

¹¹ CP 226 at ¶8.

¹² <u>Id</u>.

 $[\]frac{13}{10}$ at ¶¶ 9-10.

¹⁵ Concurrent with the escalation of the dispute between Rose and Atkinson another disagreement regarding the ownership of the marijuana licenses the partners had obtained also arose. However, the partnership dispute is not germane to this appeal. ¹⁶ CP 618-32.

going to mediate their dispute.¹⁷ However, before the parties could agree to a mediator, Atkinson filed this action.

В. Atkinson's Claims Related to the Operation and Management of Woohoo Enterprises, LLC and Discovery.

In this action, Atkinson has alleged a number of causes of action but only two concern the operations and management of Woohoo Enterprises, LLC. In her Second Cause of Action, Atkinson alleged that Rose breached his fiduciary duty of loyalty (to Atkinson) through the temporary removal of Atkinson from the Woohoo bank account and through the attempt to increase the rent that High Washington, LLC paid Woohoo for the Charleston Beach property. In her Third Cause of Action, Atkinson alleges that Rose also breached his fiduciary duty of care (to Atkinson) through the temporary removal of Atkinson from the Woohoo bank account and through the attempt to increase the rent that Hight Washington, LLC paid Woohoo for the Charleston Beach property. With each cause of action, Atkinson is seeking to invoke the remedies set forth in Attachment A to Woohoo's Operating Agreement.

Under Paragraph 7 of Attachment A, 18 a member can be dissociated from an LLC and forced to sell his or her interest in the company to the other members. 19 Under Paragraph 7. forced dissociation may occur if:

(ii) an Owner willfully of persistently commits a material breach of the Company's Operating Agreement, or of a duty owed to the Company and/or the other members...²⁰

However, before a party can be dissociated, the parties must complete the mediation/arbitration process as laid out in Woohoo Enterprises' LLC Operating Agreement. 21 Here, Atkinson alleged in her second and third causes of action that Rose breached his fiduciary duties to Atkinson, one

¹⁷ CP 227.

¹⁸ CP 237-38.

¹⁹ Id.

 $[\]frac{10}{10}$ Id. at 237. $\frac{1}{10}$

of the prerequisites to forcibly remove a member from the LLC.²² Further, Atkinson sought to prevent him from participating in the management of Woohoo Enterprises, LLC. In doing so, Atkinson asked that this Court grant relief as set forth in Attachment A, Title I, Paragraph 7(b):

Upon Dissociation of an Owner, the dissociated Owner:

- (i) shall immediately cease to be an Owner in the Company and shall have no,
- (sic) rights, authority, power, or management of the Company or in any property owned by the Company, and
- (ii) shall be entitled to receive value for his/her interest in the Company, as determined at the <u>Purchase Price on the payment Terms as described in Articles II</u> and III; and
- (iii) the Company shall continue in business without interruption and without the dissociated Owner...²³

Contrary to Atkinson's characterization of the discovery that has transpired in this action, the parties have not engaged in extensive discovery regarding Atkinson's claims that relate to Woohoo Enterprises. To the contrary, the lion's share of discovery in which the parties have engaged related specifically to the partnership dispute, not Atkinson's specific dispute with Rose regarding the operations and management of Woohoo Enterprises, LLC. The depositions that were conducted were of Rose, Beardsley, and Atkinson and combined, lasted less than three full days. Accordingly, reconsideration of the trial court's order is proper.

C. Procedural Background.

Oral argument on the motion to compel private arbitration was heard before the Honorable Leila Mills on January 13, 2017. At the hearing, the trial court issued an oral order denying Rose's Motion to Compel Arbitration. The court held that "the arbitration clause under Article V, Section 5.5 of the contract had not arisen via deadlock in voting by members, and further that Defendants waived their right to pursue arbitration via extensive litigation conduct." Specifically, the Court found that "based upon the history of this case, that there's been a waiver of the right to invoke the

²² CP. 204-205.

²³ CP. 238.

²⁴ CP. 666.

mandatory arbitration."²⁵ Judge Mills stated, "Looking at the totality of the circumstances, I am persuaded that the defendants have invoked the jurisdiction of the Court in bringing the motion to disqualify the plaintiffs' attorney."²⁶ She further stated that "I am also persuaded that the language under 5.5 does not contemplate the unilateral action that has been alleged in this case" and "I don't find that the actions that are complained of arise to a deadlock."²⁷ "It was not a negotiated situation that leads to a deadlock which then would invoke that clause. That is not the spirit of the agreement or the operating agreement. And so with that, I am finding that, even if there is no waiver, 5.5 is not applicable to this case, and, therefore, I'm denying the request for a mandatory arbitration."28

On January 23, 2017, Rose filed a Motion for Reconsideration of the Order Denying Motion to Compel Arbitration.²⁹ On February 1, 2017, Judge Mills denied Rose's Motion for Reconsideration.³⁰ The court alleged held that Rose, for the first time, argued that "Attachment A, Article I, Paragraphs 7(a) and 7(b) of the Woohoo Enterprises LLC Operating Agreement entitle them to arbitration for Plaintiffs' second and third causes of action in their complaints."31 This argument was raised in the Answer to Third Amended Complaint.³²

The court found again that Defendants waived any right to arbitration pursuant to Article V, Section 5.5 of the Operating Agreement and that the Defendants, "through their pursuit of litigation, have also waived any asserted basis for arbitration under Attachment A, Article 1, Sections 7(a) and 7(b)."33

²⁵ VR 17:25-18:2.

²⁶ VR 18:7-18:11.

²⁷ VR 19:12-19:13.

²⁸ VR 19:17-19:20.

²⁹ CP 655-71.

³⁰ CP 665-68.

³¹ CP 667.

³² CP 653.

³³ Id.

V. ARGUMENT

A. The Standard of Review for this Appeal is De Novo.

When reviewing an arbitration clause, an appellate court engages in the same inquiry as the trial court; the standard of review is de novo. *Gandee v. LDL Freedom Enter., Inc.,* 176 Wn.2d 598, 602, 293 P. 3d 1197 (2013). The appellate court reviews de novo a trial court's interpretation of a contract, including an arbitration clause. *Sales Creators, Inc. v. Little Loan Shoppe, LLC*, 150 Wn.App. 527, 529, 208 P.3d 1133, 1134 (2009); *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 636, 976 P.2d 173 (1999); *Petersen v. Schafer*, 42 Wn. App. 281, 285, 709 P.2d 813 (1985)."

We review de novo a trial court's interpretation of the language of a contract. *Knipschield v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215, 872 P.2d 1102 (1994). Under the Uniform Arbitration Act, chapter 7.04A RCW, courts have the power to determine whether a controversy is subject to an agreement to arbitrate. RCW 7.04A.060(2); *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013). The arbitrability of a dispute is determined by examining the arbitration agreement between the parties. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 403, 200 P.3d 254 (2009) (the court resolves "the threshold legal question of arbitrability"). The standard of review for this matter is *de novo*.

B. Wash R. App. P. 2.2(a)(3) Allows an Appeal as a Matter of Right From any Decision Affecting a Substantial Right in a Civil Case Which in Effect Determines the Action and Prevents a Final Judgment or Discontinues the Action. The Right to Arbitrate is a Substantial Right Under Rule 2.2(a)(3).

Wash R. App. P. 2.2(a)(3) allows an appeal as a matter of right from any decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action. The right to arbitrate is a substantial right under rule

2.2(a)(3). Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 440, 783 P.2d 1124 (1989). A court decision that discontinues an action for arbitration falls within the meaning of rule 2.2(a)(3) because it involves issues wholly separate from the merits of the dispute and because an effective challenge to the order is not possible without an interlocutory appeal. Herzog, 56 Wn. App. at 440-41.

First a motion to compel arbitration invokes special proceedings under RCW 7.04.040, possibly setting up a mini-trial on the existence or validity of an arbitration agreement, even if there is no action on the merits. *Herzog*, 56 Wn. App. at 441-42. The objective of such a motion is to initiate a separate action in the forum of arbitration. *Herzog*, 56 Wn. App. at 442. Denial of a motion to compel arbitration effectively discontinues such action. *Herzog*, 56 Wn. App. at 442. Because the ruling is upon an action separate from any related proceeding, it is appealable as a matter of right under RAP 2.2(a)(3). *Herzog*, 56 Wn. App. at 443. An order denying a motion to compel arbitration discontinues the action for arbitration and, therefore, is immediately appealable. Here, Rose has the right to appeal the trial court's erroneous decision as a matter of right.

C. The Trial Court Committed Reversible Error In Its January 13, 2017 Order When it
Found that the Arbitration Clause in the Woohoo Enterprises, LLC Operating Agreement did not
Apply to Atkinson's Claims.

Atkinson's second and third causes of action relate specifically to the power dynamic between Rose and Atkinson as members and co-managers of Woohoo Enterprises, LLC.

Woohoo Enterprises' Operating Agreement specifically states that if the members encounter a deadlock they must either mediate or arbitrate the dispute. Only if mediation or arbitration fails may a party seek court intervention. Here, Atkinson filed this action before the parties mediated or arbitrated their dispute. At no time did Rose refuse to mediate or arbitrate this matter. In fact, shortly before this suit was filed, Rose was under the impression that he and Atkinson were

working together to agree upon a mediator. Instead of agreeing upon a mediator or arbitrator,

Atkinson filed this action. Because Atkinson's second and third causes of action relate
specifically to the operations and management of Woohoo Enterprises, LLC and because

Woohoo Enterprises' Operating Agreement clearly states that the member would mediate or
arbitrate any dispute they may have, an order compelling arbitration is proper, and the trial court
erred by failing to issue an order compelling arbitration.

An agreement to arbitrate a dispute "[is] valid, irrevocable, and enforceable," subject to certain exceptions not relevant to this appeal. 9 U.S.C. § 2; accord RCW 7.04A.060(1).

Arbitration, is, however, a creation of contract, and no party to an arbitration agreement may compel another party to arbitrate a matter that it did not agree to submit to an arbitrator. Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 367-78, 292 P.3d 108 (2013). The trial court determines whether the parties have agreed to arbitrate a dispute by looking to whether a valid agreement to arbitrate exists between the parties and whether the subject matter of the dispute arguably falls within the class of disputes subject to arbitration. In re Marriage of Pascale, 173 Wn. App. 836, 842, 295 P.3d 805 (2013). If the trial court determines that an arbitration agreement creates a duty to arbitrate, it must order the parties to do so, and the arbitrator, not the trial court, must resolve the merits of the parties' claims. RCW 7.04A.060; Pascale, 173 Wn. App. at 842-43 (quoting Hanford Guards Union of Am., Local 21 of Int'l Guards Union of Am. v. Gen. Elec. Co., 57 Wn.2d 491, 498, 358 P. 3d 307 (1961)).

Washington law provides that an agreement to arbitrate is binding "except upon a ground that exists at law or in equity for the revocation of the contract." RCW § 7.04A.060(1).

Accordingly, a court would resolve a question of arbitrability by examining the validity of the arbitration agreement solely and without inquiry into the merits of the overall dispute and the

validity of the full contract within which the provision is found. Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 474, 369 P.3d 503 (2016); Townsend v. Quadrant Corp., 153 Wn. App 870, 880-81, 224 P.3d 818 (2009).

In determining whether the parties have agreed to submit to arbitration, courts will apply ordinary state law contract principals. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). It has been well settled that Washington courts apply the manifest theory of contract interpretation: "[t]he role of the court is to determine the mutual intentions of the parties according to the reasonable meaning of their words and acts." *Fisher Props. Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986)(citing *Dwelley v. Chesterfield*, 88 Wn.2d 331, 560 P.2d 353 (1977)). In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous. *Wise v. Farden*, 53 Wn.2d 162, 332 P.2d 454 (1958).

The goal of contract interpretation is to carry out the intent of the parties as manifested, if possible, by the parties' own contract language. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005)). Interpretation of an unambiguous contract is a question of law. *Absher Constr. Co. v. Kent School District No. 415*, 77 Wn.App. 137, 141, 890 P.2d 1071 (1995). A contract provision will not be considered ambiguous simply because a party suggested an opposing meaning. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 275, 883 P.2d 1387 (1994) If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the intent of the parties. *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 201, 859 P.2d 619

(1993). In interpreting an arbitration clause, the intentions of the parties as expressed in the contract control. *W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn. App. 681, 684, 736 P.2d 1100 (1987).

A reviewing court ascertains the parties' intent from reading the contract as a whole and will not read ambiguity into a contract that is otherwise clear. *McDonald v. State Farm Fire & Cas. Co.*, 117 Wn.2d 724, 733, 837 P.2d 1000 (1992). "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. A provision, however, is not ambiguous merely because the parties suggest opening meanings." *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995)(citation omitted).

Here, Rose and Atkinson clearly agreed to "mediate or arbitrate" their disputes related to the operation and management of Woohoo Enterprises, LLC. Atkinson undoubtedly believed that Rose should have first sought her vote before attempting to raise High Washington's monthly rent and any action taken related to her access to the company's bank account. Notably, Atkinson believed that mediation was appropriate initially and only elected to file suit after Rose did not agree to the mediator Atkinson proposed. These actions illustrate that the claims fall squarely within the prevue of paragraph 5.5(a).

Paragraph 5.5(a) states that Atkinson and Rose agreed to enter into binding mediation or arbitration if they reach a "deadlock", which Atkinson and Rose reached. "Deadlock" is defined as when the members cannot come to an agreement after negotiations. While the operating agreement defined "deadlock", it did not prescribe a specific procedure that must be followed for the parties to "negotiate" a resolution. When terms are not specifically defined, the court will look to the ordinary meaning of terms. *Nye v. Univ. of Wash.*, 163 Wn. App. 875, 883, 260 P.3d

1000 (2011). Webster defines "negotiation" as "discussion aimed at reaching an agreement."³⁴ Given the facts that led up to Atkinson's lawsuit, the trial court erred when it determined that the arbitration clause did not apply.

As set forth in the record, prior to Atkinson's lawsuit, Rose attempted to work with her to place her back onto Woohoo's bank account. Atkinson refused to cooperate. Additionally, both Atkinson and Rose were working, through counsel, to mediate the issues related to the management and control of Woohoo as well as the issues related to the Partnership. Both in her briefing and at the hearing, Atkinson argued that there was no "negotiations" because she and Rose never formally met to resolve their dispute. Atkinson also argued that because Rose did not call a formal vote, the deadlock clause did not apply. However, that position, which the trial court adopted, ignores the relatively low threshold required to meet deadlock's "negotiation" requirement. The plain language of the operating agreement did not require that Rose and Atkinson have a formal meeting to discuss their differences. Nor did the operating agreement require that they do so. Instead, the operating agreement only required that they have a conversation, regardless of the medium used to communicate, to see if they could resolve their difference. That occurred here and, in fact, it was Rose's understanding that he and Atkinson were setting up mediation when Atkinson filed suit.

Because Atkinson and Rose encountered a deadlock as that term is used in the operating agreement, the trial court erred when it found that the arbitration clause found Woohoo's operating Agreement did not apply to Atkinson's second and third causes of action.

Accordingly, reversal and remand is appropriate.

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³⁴ https://www.merriam-webster.com/dictionary/negotiate (last visited June 29, 2017).

1. Washington Public Policy Favors Arbitration and Therefore, any Question of Whether Atkinson and Rose's Claims are Subject to Private Arbitration Should be Resolved in Favor of Arbitration.

To the extent the Court felt that Atkinson and Rose's dispute did not fall squarely within the arbitration provision, the trial court erred when it did not resolve the question in favor of private arbitration. There is a strong public policy in Washington State favoring arbitration of disputes. Munsey v. Walla Walla College, 80 Wn. App. 92, 94, 906 P.2d 988 (1995). The purpose of arbitration is to avoid the formalities, the expense, and the delays of the court system. Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 766, 934 P.2d 731 (1997); See also Barnett v. Hicks, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992). Arbitration proceedings may be casually structured. Barnett, 119 Wn.2d at 155. The goals of the arbitration process would not be served if arbitrators and judges were held to the same high standard. Schreifels v. Safeco Co., 45 Wn. App. 442, 449 n.3, 725 P.2d 1022 (1986). Washington courts are reluctant to intervene in the arbitration and take a narrow approach when construing Wash. Rev. Code § 7.04 and intervening in the arbitration process. Perez v. Mid-Century Ins. Co., 85 Wn. App. 760, 762, 934 P.2d 731, 732 (1997). Strong public policy favoring finality of arbitration dictates any ambiguity with respect to which statute the parties have invoked be resolved in favor of binding arbitration under RCW 7.04 If the reviewing court "can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration." Davis v. Gen. Dynamics Land Sys., 152 Wn. App. 715, 718, 217 P.3d 1191 (2009); Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 454, 45 P.3d 594 (2002).

Any doubts regarding the applicability of an arbitration agreement "should be resolved in favor of coverage." *Heights*, 148 Wn. App. at 405. It is well established that "if the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper

interpretations is for the arbitrator." *Meat Cutters Local no. 494 v. Rosauer's Super Mkts., Inc.*, 29 Wn. App. 150, 154, 627 P.2d 1330 (1981).

Washington courts apply a strong presumption in favor of arbitration. In *Peninsula School District No. 401 v. Public School Employees of Peninsula*, the Washington Supreme Court clearly articulated the principles of arbitrability, setting forth the limitation of a trial court's discretion when ruling on a motion to compel arbitration:

"Although it is the court's duty to determine whether the parties have agreed to arbitrate a particular dispute, the court cannot decide the merits of the controversy, but may determine only whether the grievant has made a claim which on its face is governed by the contract." Peninsula School District No. 401 v. Public School Employees of Peninsula, 130 Wn. 2d 413-14, 924 P.2d 13 (1996).

Any doubts should be resolved in favor of coverage, and further, all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication. *Peninsula*, 130 Wn.2d at 413-14.

Here, the parties unequivocally agreed to arbitrate disputes that relate to the operations and management of Woohoo Enterprises. The factual basis of Atkinson's claims relate to the management and operations of Woohoo Enterprises, LLC. Critically, Atkinson's claims relate specifically to Article V of the Woohoo Enterprises' Operating Agreement because her claims are based upon Rose's alleged unauthorized removal of Atkinson from Woohoo's KeyBank account and Rose's alleged unauthorized attempts to evict High Washington. While section 5.5(a) is within the "Voting" section of the operating agreement, Atkinson and Rose clearly intended that their disputes be resolved through arbitration or mediation. Atkinson is arguing that she and Rose should have held a vote and agreed before Rose allegedly took his actions. By making this argument, Atkinson evoked paragraph 5.5(a) and should have agreed to arbitrate before filing the lawsuit. The notion that because Rose did not hold a formal "vote" before he

purportedly took the complained of actions does not exempt Atkinson's claims from paragraph 5.5. As set forth in *Meat Cutters Local No. 494*, since a court can fairly ascertain that Atkinson and Rose intended that disputes similar to Atkinson's claims would be subject to private arbitration. At the core of Atkinson's claims are that she and Rose were at a deadlock regarding whether Rose should have attempted to raise High Washington's rent and whether her access to the Woohoo Enterprises bank account should be been temporarily suspended. The assertion that Atkinson's claims are not subject to private arbitration because Rose did not first hold a formal vote runs contrary to the principle that a court's application of Chapter 7.06 and its interpretation of a contract should favor enforcement of an arbitration clause. If there is any doubt as to whether Paragraph 5.5(a) applies to Atkinson's claims against Rose, the issue should be decided in favor of enforcement of the arbitration clause.

In the pleadings, Atkinson is alleging that Rose acted unilaterally. The challenged actions define the ordinary meaning of deadlock. The term "deadlock" is defined as a situation when, after negotiations, Atkinson and Rose cannot reach an agreement regarding any act or decision of the company. Interpreting the clause in a manner favorable to arbitration, Atkinson's Second Cause of Action and Third Cause of Action should be resolved by an arbitrator. Both claims involve Rose's allegedly "unauthorized" acts. Since Atkinson did not agree with the complained of actions, she and Rose were in a deadlock and Atkinson should have initiated private arbitration to resolve the dispute. The issues addressed in Atkinson's second and third causes of action are inextricably related to and arise from a central factual dispute between Rose and Atkinson: what authority do the members of Woohoo Enterprises, LLC have under the company's Operating Agreement. As a result, the issues should be resolved per the terms of the Operating Agreement's arbitration clause.

Because Atkinson's Second Cause of Action and Third Cause of Action clearly involve a "deadlock" between Atkinson and Rose, Paragraph 5.5(a) applies and an order placing these claims into private arbitration is proper.

D. The Trial Court Erred when it Found that Rose Waived his Right to Private Arbitration
Because None of his Actions Show that he Unequivocally Waived his Right.

The trial court erred when it found that Rose waived his right to private arbitration because none of his actions constitute an unequivocal waiver of his right to private arbitration. A waiver is an intentional relinquishment or abandonment of a known right or privilege. *State v. Thomas,* 128 Wn. 2d 553, 910 P.2d 475 (1996)(*quoting Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938)). In part because of a strong policy favoring arbitration, waiver is not a favored defense to compelling arbitration. Courts wish to encourage parties to resolve their legal disputes by arbitration. *Schuster v. Prestige Senior Mgmt., LLC,* 193 Wn.App. 616 (2016).

A party only loses the right to arbitrate if its conduct is inconsistent with an intent to arbitrate and it does not take action to enforce that right within a reasonable time. *Otis Hous*. *Ass'n v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). In other words, if a party chooses to litigate an issue rather than arbitrate it, then it waives any right to arbitration. *Id.* Waiver of a known right must be intentional and voluntary. *Ives v. Ramden*, 142 Wn. App. 369, 383, 174 P.3d 1231 (2008). Waiver of a contractual right to arbitration is disfavored and a party alleging waiver has a heavy burden of proof. *River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 237, 272 P.3d 289 (2012).

As of the date the trial court ruled on Rose's reconsideration, the parties have only engaged in discovery and have not actively litigated Atkinson's second and third causes of action. Rose's only conduct with respect to Atkinson's second and third causes of action is an

answer wherein Rose denied Atkinson's allegations. No counterclaims had been filed that relate to the Woohoo and High Washington business relationship and lease.³⁵ The parties, in fact, had little other than the initial discovery in this matter.³⁶

Because Rose has not to litigated Atkinson's Second Cause of Action or Third Cause of Action, he has neither intentionally nor voluntarily waived his right to arbitration.

1. Requirements for Waiver.

The requirements for waiver vary with the circumstances. Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co., 4 Wn. App. 695, 483 P.2d 880 (1971). It is generally defined as the voluntary and intentional relinquishment of a known right. Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). This definition of waiver applies to the waiver of an arbitration clause, and such a waiver is a power exclusive to the party relinquishing the right to demand arbitration. See e.g., Puget Sound Bridge & Dredging Co. v. Lake Wash. Shipyards, 1 Wn.2d 401, 96 P.2d 257 (1939); Olympian Stone Co. v. MacDonald Constr. Co., 1 Wn. App. 410, 461 P.2d 589 (1969). The existence of a wavier is to be determined by the trier of fact. Bowman v. Webster, supra.

Waiver of an arbitration clause may be accomplished expressly or by implication. *Geo. V. Nolte & Co. v. Pieler Constr. Co.*, 54 Wn.2d 30, 337 P.2d 710 (1959). A finding of implied waiver presents mixed questions of law and fact if there is a dispute as to the meaning of the legal terms at issue as well as to the reasonableness of the inferences to be drawn from the facts. *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co., supra.*

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³⁵ After the trial court denied Rose's motion for reconsideration, Rose amended the counterclaims to add claims he had against Atkinson for her actions in the management of Woohoo Enterprises, LLC. Rose brought his claims at that point in time because he feared that the court of appeals may not decide this matter before the statute of limitations on his claims expired.

³⁶ While Atkinson may consider the deposition of Rose and Michelle Beardsley to be "extensive", Rose's deposition did not last a full day.

In Lake Washington School District No. 414 v. Mobile Modules Nw., 28 Wn. App. 59, 61-64, 621 P.2d 791, 793-95 (1980), the court found that the contractor preserved their right to arbitrate by asserting it in the answer. Also, the contractor's assertion of a compulsory counterclaim and its limited use of discovery prior to the motion to compel arbitration did not constitute conduct inconsistent with its right to seek arbitration. The action was stayed pending arbitration.

Similarly, in this matter, Rose preserved his right to arbitrate by asserting it in his answer.

Rose did not waive his right to arbitrate.

2. <u>Cases in Which the Court of Appeals Affirmed a Finding of Waiver Contain Sets of Facts that are Fundamentally Different than the Facts in this Matter.</u>

In Washington, courts have found waiver when the appellants conducted extensive discovery and sought to enforce an arbitration clause only after the opposing party had filed a motion for summary judgment. See Saili v. Parkland Auto Center, Inc., 181 Wn. App. 221, 329 P.3d 915 (2014), review denied, 181 Wn.2d 1015 (2014), In Saili v. Parkland Auto Center, Inc., the buyer brought suit against the car dealership from which he had purchased a truck asserting claims related to his purchase of truck and the dealership's later repossession of the truck and another vehicle. Saili v. Parkland Auto Center, Inc., supra. After the buyer moved for summary judgment, the dealership moved for an order staying proceedings and compelling arbitration. The trial court denied the motion, and this court affirmed on the ground of waiver. In affirming the trial court's decision, this Court noted the dealership omitted any reference to arbitration in its answer, engaged in discovery, and waited until after the buyer brought a summary judgment motion before seeking an order compelling arbitration. The delay lasted seven months.

Rose's case differs. There was no summary judgment hearing. Unlike *Saili*, Rose did not omit any reference to arbitration in his answer.³⁷ Further, he did not wait until a dispositive motion was pending to seek private arbitration. In fact, only after he sought private arbitration was a trial date set in this matter.

In Shepler Construction, Inc. v. Leonard, Division I held both parties waived arbitration. The plaintiff contractor brought suit to foreclose on a mechanic's lien. Shepler Construction, Inc. v. Leonard, 175 Wn. App. 239, 306 P.3d 988 (2013). The defendant homeowner counterclaimed for defective construction. Neither party sought arbitration until seven years after litigation began. Id.

Here, Rose's case differs because he sought arbitration early on, not seven years after litigation began.

In *River House Development, Inc. v. Integrus Architecture, PS*, the plaintiff filed suit and engaged in litigation but later requested arbitration. *River House Development, Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 272 P.3d 289 (2012). This court held that the plaintiff waived its right to arbitration when that party attended a status conference in person with the assigned judge, agreed to a case schedule and trial date, exchanged trial witness lists with the opposing party, participated in formal discovery and motion practice regarding discovery, and represented to the court that it was preparing for trial.

In this matter, unlike *River House*, the parties have not agreed to a case schedule and trial date. In fact, none was set when the trial court ruled on Rose's motion for reconsideration. No exchange of trial witness lists with the opposing party has taken place, and neither party has represented to the court that they were preparing for trial.

³⁷ See CP 653.

In *Ives v. Ramsden*, this court held that a defendant waived his right to arbitration when he answered the plaintiff's complaint without mentioning arbitration, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial without moving to stay the action to allow the parties to arbitrate. *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008). Three years and four months had elapsed since the complaint was filed, and the party seeking arbitration did not raise the issue until the day before trial.

Here, Rose's case differs because he filed a motion to compel arbitration well before any extensive discovery commenced. In fact, the lion's share of discovery in which the parties have engaged related specifically to the partnership dispute, not Atkinson's specific dispute with Rose regarding the operations and management of Woohoo Enterprises, LLC. Only three depositions, which lasted three full days, have occurred. Litigation in this matter is currently stagnant as the case was recently moved to Track-II litigation, and there is no current case schedule. As such, Rose has not waived his right to arbitrate.

3. <u>Cases Where Courts Found "No Waiver" More Closely Resemble the Facts</u> Presented in This Matter.

In Verbeek Properties, LLC v. GreenCo Environmental, Inc., a landowner Verbeek
Properties, who hired an environmental company to remediate the soil to meet Department of
Ecology standards, brought action against the company, alleging breach of contract, fraud,
negligent misrepresentation, and violation of the Consumer Protection Act. Verbeek Properties,
LLC v. GreenCo Environmental, Inc., 159 Wn. App. 82, 246 P.3d 205 (2010). The landowner
also filed a motion to dismiss the environmental company's lien on its property for the contract
amount withheld. This court ruled that the landowner's failure to mention arbitration in its
complaint against the company was not a waiver of arbitration and the landowner did not waive

the right to arbitrate through its preliminary attempt to remove the company's lien on the ground that it was frivolous.

Here, like *Verbeek*, Rose did give notice that Atkinson's claims were subject to private arbitration in his answer to Atkinson's Third Amended Complaint. Like *Verbeek*, by filing the Motion to Disqualify Attorney, Rose did not waive arbitration.

In Lake Washington School District No. 414 v. Mobile Modules Northwest, Inc., 28 Wn. App. 59, 621 P.2d 791 (1980), the defendant's answer referred to the arbitration clause and requested a stay of court proceedings pending arbitration. The defendant formally moved for a stay three months later. This court held that there was no waiver, emphasizing that the party preserved the right to arbitrate in its answer and that the three-month delay was insufficient to establish waiver.

Likewise, in this matter on December 21, 2016, in the Answer to Third Amended Complaint, Rose alleges the "second cause of action and third cause of action are subject to binding arbitration agreement." Like the defendants in *Lake Washington School District No. 414*, Rose preserved the right to arbitrate in his answer. In fact, Rose fully intended to arbitrate the Atkinson's Second and Third causes of action. There was no waiver. The few month delay in filing the motion to compel is not evidence of waiver. In fact, substantially longer delays have been held not to constitute waiver. *See, e.g., Geo. V. Nolte & Co. v. Pieler Constr. Co., supra* (5 months); *Lumbermens Mut. Cas. Co. v. Borden Co.*, 268 F. Supp. 303 (S.D.N.Y. 1967) (2 years). Rose did not waive his right to arbitrate.

³⁸ CP 653.

4. The Motion to Disqualify Attorney Filed did not Constitute a Waiver of Rose's Right to Private Arbitration.

Washington courts require prompt filings of Motion for Disqualification. *First Small Bus*. *Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 337, 738 P.2d 263 (1987)("A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion."). Accordingly, Rose promptly filed the Motion. However, he did not reach the merits of the case in the motion. Instead, Rose simply addressed the conflict of interest that existed with Atkinson's attorney. Specifically, Rose argued that a conflict of interest in violation of RCP 1.7 existed because Bricken met with Atkinson and Rose in 2013 and discussed the creation of the Partnership. Ultimately, the trial court denied the Motion.

In her ruling on the Motion to Compel, the Honorable Leila Mills, stated: "looking at the totality of the circumstances, I am persuaded that the defendants have invoked the jurisdiction of the Court in bringing the motion to disqualify the plaintiffs' attorney. That was in May of 2016. Albeit that defendants are correct, that there is no requirement to invoke that—the clause in any set period of time, I have to use my common sense as to at what point in time is it unequivocal that the defendants have submitted to the jurisdiction of the court." The caselaw, however, is not in agreement with the trial court's statements.

The Motion to Disqualify would have been filed regardless of whether this case was litigated in the superior court or in arbitration because Rose believed there was a conflict of interest on the part of the attorney. Atkinson's counsel had drafted some documents, and had given some legal advice related to the operation of the 502 stores. The Motion did not discuss the merits of the case.

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³⁹ VR 18:14-18:16.

If substantial rights of a party have not been affected by failure to properly raise affirmative defense, the defense is not waived. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 76, 549 P.2d 9 (1976). Here, to the contrary, Rose properly and timely raised the affirmative defense, in his Answer to Third Amended Complaint. Rose specifically asserted that "Plaintiffs' Second Cause and Third Cause of Action are subject to a binding arbitration agreement." *CP 9* at p. 20. Litigation in this matter is currently stagnant as the case was recently moved to Track-II litigation. There is no current case schedule. Because Atkinson will not be prejudiced, Rose did not waive his right to private arbitration.

The parties have not engaged in extensive discovery, particularly in matters related to Woohoo Enterprises, LLC. When the trial court considered Rose's motion, no dispositive motions had been filed, no case schedule had been established, and no trial date had been set. In fact, other than the motion to disqualify counsel, no other motions practice had occurred. The lion's share of discovery the parties have conducted related specifically to the partnership dispute, not Atkinson's specific dispute with Rose regarding the operations and management of Woohoo Enterprises, LLC. Rose attempted to mediate the Woohoo matter prior to Atkinson filing suit. Rose also raised Arbitration in his Answer to Affirmative Defenses to the Third Amended Complaint. Finally, although Washington courts do not require that the party opposing arbitration show prejudice, it must be noted that Atkinson would not have been prejudiced had the trial court granted Rose's motion to compel arbitration. There is nothing that would have prevented Atkinson from utilizing the discovery that had been performed in this matter to prepare for private arbitration and there were no law of the case issues this matter may have presented in the private arbitration.

Waiver exists when the movant establishes his intent to pursue litigation in a court instead of private arbitration. When a movant has shown an intent to pursue arbitration, waiver cannot be found. Here, Rose did not act in a manner that unequivocally showed he intended to abandon private arbitration. Further, he raised the defense that claims related to Woohoo were subject to private arbitration in his answer and affirmative defenses to the third amended complaint. For these reasons and arguably because Atkinson will not be prejudiced by an order compelling private arbitration, reversal and remand of the lower court's order that denied Rose's request to compel private arbitration for Atkinson's second and third causes of action is proper.

VI. Conclusion

Rose submits the trial court erred when it denied his Motion to Compel Arbitration. The facts of this case and the Washington statutory and caselaw support a finding that the parties have a binding arbitration agreement, and that Rose did not waive his right to arbitration. Rose respectfully asks that this Court reverse the decision of the trial court and issue an Order Compelling Private Arbitration.

Respectfully submitted this 29th day of June 2017.

MDK Law

/s/ Courtney D. Bhatt

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DECLARATION OF SERVICE

I certify that on June 29, 2017 I caused a true and correct copy of the Appellant's Opening Brief to be served upon the Appellee and necessary parties via counsel in the manner indicated below:

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APPENDIX A

6/29/2017 9 USCS § 2



Q

Document: 9 USCS § 2



Actions *

Previous Next >

9 USCS § 2

Copy Citation

Current through PL 115-41, approved 6/23/17

United States Code Service - Titles 1 through 54 TITLE 9. ARBITRATION CHAPTER 1. GENERAL PROVISIONS

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

History

(July 30, 1947, ch 392, § 1,61 Stat. 670.)

Prior law and revision:

This section is based on Act Feb. 12, 1925, ch 213, § 2, 43 Stat. 883 (§ 2 of former Title 9).

APPENDIX B

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938

Research	Q		More ▼				
Document: First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 Actions →							
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Pirst Options of Chicago, Inc. v. Kaplan, 514 U.S. 938

Copy Citation

Supreme Court of the United States

March 22, 1995, Argued; May 22, 1995, Decided

No. 94-560

Reporter

514 U.S. 938 * | 115 S. Ct. 1920 ** | 131 L. Ed. 2d 985 *** | 1995 U.S. LEXIS 3463 **** | 63 U.S.L.W. 4459 | Fed. Sec. L. Rep. (CCH) P98,728 | Comm. Fut. L. Rep. (CCH) P26,398 | 95 Cai. Daily Op. Service 3821 | 95 Daily Journal DAR 6474 | 9 Fla. L. Weekly Fed. S 64

FIRST OPTIONS OF CHICAGO, INC., PETITIONER v. MANUEL KAPLAN, ET UX. AND MK INVESTMENTS, INC.

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Disposition: 19 F.3d 1503, affirmed.

Core Terms

arbitrability, parties, court of appeals, district court, courts, confirm, merits, arbitral decision, parties agree, arbitration award, disputes, leeway, agreed to arbitrate, standard of review, circumstances

https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=daea9543-da61-49fc-9aab-f7a3c4c00f79&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3... 1/20

Case Summary

Procedural Posture

The arbitrators found in favor of petitioner clearinghouse in its dispute with respondents, a stock trader, his wife, and his wholly owned investment company, for payment of a debt. The award was confirmed by the district court pursuant to 9 U.S.C.S. § 9. The United States Court of Appeals for the Third Circuit reversed. The Court granted certiorari.

Overview

The clearinghouse cleared stock trades for the investment company, which incurred substantial losses in its trading account. The clearinghouse and the investment company entered into an agreement for repayment of the debt. When the investment company lost additional money, the clearinghouse demanded immediate repayment and insisted that the stock trader and his wife personally pay any deficiency. The clearinghouse sought arbitration under the Arbitration Act, 9 U.S.C.S. § 1 et seq. Neither the stock trader nor his wife had personally signed the repayment agreement. They contested the arbitrability of the dispute with the clearinghouse. The Court held (1) the record did not show that the stock trader and his wife clearly agreed to have the arbitrators decide the question of arbitrability, (2) the court of appeals correctly held the arbitrability of the dispute between the clearinghouse and the stock trader and his wife was subject to independent review by the courts, and (3) the court of appeals used the proper standard in reviewing the district court's arbitrability determinations by reviewing questions of fact under a clearly erroneous standard and questions of law de novo.

The Court affirmed the judgment of the court of appeals.

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Business & Corporate Compliance > ... > Pretrial Matters ▼ > Alternative Dispute Resolution ▼ > Judicial Review ▼ International Trade Law > Dispute Resolution ▼ > International Commercial Arbitration ▼ > Arbitration ▼ View more legal topics

HN1♣ Alternative Dispute Resolution, Judicial Review

A party who does not agree to arbitrate will normally have a right to a court's decision about the merits of its dispute. But, where the party agrees to arbitrate, he or she, in effect, relinquishes much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances, 9 U.S.C.S. § 10, such as an award procured by corruption, fraud, or undue means or where the arbitrator exceeds his powers. The parties bound by the arbitrator's decision are not in manifest disregard of the law. Q More like this Headnote

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938

6/29/2017

Shepardize - Narrow by this Headnote (228)

Business & Corporate Compliance > ... > <u>Alternative Dispute Resolution</u> ▼ > <u>Arbitration</u> ▼ > <u>Arbitrability</u> ▼ View more legal topics

HN2 ♣ Arbitration, Arbitrability

The arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. Q More like this Headnote

Shepardize - Narrow by this Headnote (717)

Business & Corporate Compliance > ... > <u>Alternative Dispute Resolution</u> ▼ > <u>Arbitration</u> ▼ > <u>Arbitrability</u> ▼ International Trade Law > Dispute Resolution ▼ > International Commercial Arbitration ▼ > Arbitration ▼ View more legal topics

HN3 Arbitration, Arbitrability

If the parties agree to submit the arbitrability question itself to arbitration, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties agree to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. 9 U.S.C.S. § 10. If, on the other hand, the parties do not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it decides any other question that the parties do not submit to arbitration, namely, independently. Q More like this Headnote

Shepardize - Narrow by this Headnote (919)

Business & Corporate Compliance > ... > Formation of Contracts ▼ > Contracts Law ▼ > Formation of Contracts ▼ View more legal topics

HN4 Contracts, Formation of Contracts

When deciding whether the parties agreed to arbitrate a certain matter, including arbitrability, courts generally should apply ordinary state-law principles that govern the formation of contracts, Q More like this Headnote

Shepardize - Narrow by this Headnote (2056)

Contracts Law > Defenses → > Ambiguities & Mistakes → > General Overview → View more legal topics

6/29/2017

HN5 Arbitration, Arbitrability

Courts should not to assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so. In this manner the law treats silence or ambiguity about the question who primarily should decide arbitrability differently from the way it treats silence or ambiguity about the question whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement. In respect to this latter question the law reverses the presumption. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, Q More like this Headnote

Shepardize - Narrow by this Headnote (1283)

Business & Corporate Compliance > ... > <u>Alternative Dispute Resolution</u> ▼ > <u>Arbitration</u> ▼ > <u>Arbitrability</u> ▼ View more legal topics

HN6. Arbitration, Arbitrability

Issues will be deemed arbitrable unless it is clear that the arbitration clause does not include them. Q More like this Headnote

Shepardize - Narrow by this Headnote (100)

Business & Corporate Compliance > ... > Pretrial Matters → > Alternative Dispute Resolution → > Mandatory ADR → Civil Procedure > ... > <u>Alternative Dispute Resolution</u> ▼ > <u>Arbitration</u> ▼ > <u>General Overview</u> ▼

HN7 ♣ Alternative Dispute Resolution, Mandatory ADR

A party can be forced to arbitrate only those issues it specifically agrees to submit to arbitration. Q More like this Headnote

Shepardize - Narrow by this Headnote (80)

Business & Corporate Compliance > ... > <u>Alternative Dispute Resolution</u> ➡ > <u>Arbitration</u> ➡ > <u>Arbitrability</u> ➡ View more legal topics

HN8 Arbitration, Arbitrability

Merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, that is, a willingness to be effectively bound by the arbitrator's decision on that point. Q More like this Headnote

Shepardize - Narrow by this Headnote (416)

Business & Corporate Compliance > ... > <u>Pretrial Matters</u> → > <u>Alternative Dispute Resolution</u> → > <u>Judicial Review</u> → Civil Procedure > Appeals ▼ > Standards of Review ▼ > De Novo Review ▼ View more legal topics

6/29/2017

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938

HN9 Alternative Dispute Resolution, Judicial Review

A district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration should proceed like review of any other district court decision finding an agreement between parties, that is, accepting findings of fact that are not clearly erroneous but deciding questions of law de novo. Q More like this Headnote

Shepardize - Narrow by this Headnote (834)

Administrative Law >

Judicial Review

Standards of Review

Seneral Overview

General Overview

Administrative Law >

General Overview

Administrati Civil Procedure > Appeals ➤ > Standards of Review ➤ > General Overview ➤

HN10 Judicial Review, Standards of Review

The reviewing attitude that a court of appeals takes toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result. The law, for example, tells all courts, trial and appellate, to give administrative agencies a degree of legal leeway when they review certain interpretations of the law that those agencies have made. Q More like this Headnote

Shepardize - Narrow by this Headnote (46)

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Decision

Federal Court of Appeals held to have been correct in (1) finding that arbitrability of particular dispute was subject to independent judicial review, and (2) using ordinary standards to review Federal District Court's arbitrability determinations.

Summary

A dispute arose between a stock-trade-clearing firm and a husband and wife as to whether the couple was personally liable to the firm for a debt to the firm of an investment company which was wholly owned by the husband. The firm sought arbitration, by a panel of a stock exchange, of this dispute and some related disputes. The investment company, which had signed a document containing an arbitration clause, accepted arbitration, but the couple (1) had not personally signed that document; (2) denied that the couple's dispute was arbitrable; and (3) filed written objections to that effect with the arbitration panel. However, the arbitrators (1) decided that they had the power to rule on the merits of the parties' dispute; and (2) did so in the firm's favor. Under the Arbitration Act (9 USCS 1 et seq.), the couple asked the United States District Court for the Eastern District of Pennsylvania to vacate the arbitration award, while the firm

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requested the award's confirmation. The District Court confirmed the award. On appeal, however, the United States Court of Appeals for the Third Circuit, in reversing in pertinent part, agreed with the couple that the couple's dispute with the firm was not arbitrable (19 F3d

On certiorari, the United States Supreme Court affirmed. In an opinion by Breyer, J., expressing the unanimous view of the court, it was held that (1) under the Act, because the couple had not clearly agreed to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the dispute between the firm and the couple was subject to independent review by the courts; (2) the Court of Appeals used the proper standards for reviewing the District Court's determinations as to the dispute's arbitrability, where the Court of Appeals believed that (a) there was no special standard governing such review, and (b) review of the District Court's award-confirming decision should proceed like review of any other District Court decision finding an agreement between parties, that is, with the Court of Appeals' accepting findings of fact that were not clearly erroneous but deciding questions of law de noyo; and (3) the factbound issue whether the Court of Appeals erred in its ultimate conclusion that the dispute's merits were not arbitrable was beyond the scope of the two standard-of-review questions which the Supreme Court had agreed to review.

Headnotes

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ARBITRATION §16 > confirmation or vacation of award -- arbitrability of dispute -- > Headnote: <u>LEGHN[1A]</u> [1A]<u>LEGHN[1B]</u> [1B]<u>LEGHN[1C]</u> [1C]<u>LEGHN[1D]</u> [1D]<u>LEGHN[1E]</u> [1E]

With respect to the confirmation or vacation, under the Arbitration Act (9 USCS 1 et seq.), of an arbitration award concerning a dispute between a stock-trade-clearing firm and a husband and wife as to whether the couple was personally liable to the firm for a debt to the firm of an investment company which was wholly owned by the husband, a Federal Court of Appeals is correct in finding that the arbitrability of the dispute was subject to independent review by the courts, where (1) on the record, the firm cannot show that the couple clearly agreed to have the arbitrators decide the question of arbitrability, as (a) while the couple filed with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction, a party's merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, that is, a willingness to be effectively bound by the arbitrator's decision on that point, (b) to the contrary, one naturally would think that the couple did not want the arbitrators to have binding authority over the couple, (c) this conclusion draws added support from an explanation for the couple's presence--that is, that the husband's company was arbitrating some matters--and from the Court of Appeals' law then suggesting that the couple might argue arbitrability to the arbitrators without losing the right to independent court review, and (d) the point that the couple had other ways to obtain an independent court decision on the question of arbitrability does not say anything about whether the couple intended to be bound by the arbitrators' decision; (2) factual circumstances vary too greatly to permit a confident conclusion about whether allowing an arbitrator to make an initial, but independently reviewable, arbitrability determination would, in general, slow down the dispute resolution process; and (3) there is no strong arbitrationrelated policy disfavoring independent judicial review in such circumstances.

APPEAL \$1318 > Federal District Court decision in favor of award -- review of arbitrability determinations -- facts and law -- > Headnote: <u>LEdHN[2A]</u> [2A]<u>LEdHN[2B]</u> [2B]<u>LEdHN[2C]</u> [2C]<u>LEdHN[2D]</u> [2D]

On appeal of a Federal District Court decision which, under the Arbitration Act (9 USCS 1 et seq.), refuses to vacate or confirms an arbitration award concerning a dispute, a Federal Court of Appeals uses the proper standards for reviewing the District Court's determinations as to the dispute's arbitrability, where (1) the Court of Appeals believes that (a) there is no special standard governing such review, and (b) review of, for example, a District Court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration should proceed like review of any other District Court decision finding an agreement between parties, that is, with the Court of Appeals' accepting findings of fact that are not clearly erroneous but deciding questions of law de novo, (2) it is undesirable to make the law more complicated by proliferating review standards without good reasons, (3) while courts grant arbitrators considerable leeway when reviewing most arbitration decisions, that fact does not mean that appellate courts should give extra leeway to District Courts that uphold arbitrators, (4) while 9 USCS 16 allows Courts of Appeals to conduct interlocutory review of certain antiarbitration District Court rulings such as orders enjoining arbitrations, but not interlocutory review of certain District Court orders upholding arbitration, such as orders refusing to enjoin arbitrations, that portion of the Act governs the timing of review and is therefore too weak a support for the distinct claim that a Court of Appeals should use a different standard when reviewing certain District Court decisions, and (5) the Act says nothing about standards of review; thus, a Court of Appeals should apply ordinary, not special, standards when reviewing District Court decisions upholding arbitration awards, and it is improper for a Court of Appeals to apply, because of federal policy favoring arbitration, a specially lenient abuse-of-discretion standard, even as to questions of law, when reviewing District Court decisions that confirm, but not those that set aside, arbitration awards.

APPEAL §1502 > review of facts -- Federal District Court decision confirming arbitration award -- > Headnote:

In affirming a Federal Court of Appeals' judgment against a stock-trade-clearing firm and in favor of a husband and wife--which judgment reversed a Federal District Court's confirmation, under the Arbitration Act (9 USCS 1 et seq.), of an arbitration award based in part on the arbitrators' decision that they had the power to rule on the merits of a particular dispute between the firm and the couple--the United States Supreme Court will hold that the factbound issue whether the Court of Appeals erred in its ultimate conclusion that the dispute's merits were not arbitrable is beyond the scope of the questions which the Supreme Court agreed to review, where the Supreme Court (1) granted certiorari to consider two questions concerning the proper standard of judicial review; and (2) rules against the firm on both of those questions.

ARBITRATION §2 > COURTS §845 > EVIDENCE §385 > Arbitration Act -- arbitrability -- review of arbitrator's decision -- state law -presumptions -- > Headnote:

LEdHN[4] **±** [4]

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Under the Arbitration Act (9 USCS 1 et seq.), just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who--an arbitrator or a court--has the primary power to decide arbitrability turns upon what the parties agreed about the matter; if the parties agreed to submit the arbitrability question itself to arbitration, then a court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard which courts apply when they review any other matter that parties have agreed to arbitrate, that is, a court should give considerable leeway to the arbitrator and should set aside the arbitrator's decision in only certain narrow circumstances; on the other hand, if the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as the court would decide any other question that the parties did not submit to arbitration, namely independently; these two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties, that is, that arbitration is a way to resolve those disputes, but only those disputes, that the parties have agreed to submit to arbitration; while courts--when deciding whether the parties agreed to arbitrate a certain matter, including arbitrability--generally should apply ordinary state-law principles that govern the formation of contracts, courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that the parties did so; in this manner, the law treats silence or ambiguity about the question who primarily should decide arbitrability differently from the way that the law treats silence or ambiguity about the question whether a particular merits-related dispute is arbitrable as within the scope of a valid arbitration agreement, for in respect to the latter question, the law reverses the presumption; this difference in treatment is understandable, where (1) the latter question arises when the parties have a contract that provides for arbitration of some issues, but (2) the former question is rather arcane, and a party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers.

ARBITRATION §11 > court decision on arbitrability -- > Headnote:

LEdHN[5] **₺** [5]

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Under the Arbitration Act (9 USCS 1 et seq.), a party to a dispute may obtain an independent court decision on the question of the dispute's arbitrability without arguing the question to an arbitrator; this may be done by, for example, (1) trying to enjoin the arbitration, or (2) refusing to participate in the arbitration and then defending against a court petition which the opposing party brings to compel arbitration.

ARBITRATION §2 > statutory objective -- > Headnote:

LEdHN[6] ₹ [6]

The basic objective under the Arbitration Act (9 USCS 1 et seq.) is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to insure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties.

APPEAL §1257 > reviewing attitude -- > Headnote:

The reviewing attitude that a Federal Court of Appeals takes toward a Federal District Court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result.

ADMINISTRATIVE **LAW** §275 > judicial review -- > Headnote:

*LEdHN[8]***₺** [8]

The law tells all courts, trial and appellate, to give administrative agencies a degree of legal leeway when the courts review certain interpretations of the law that those agencies have made.

Syllabus

This case arose out of disputes centered on a "workout" agreement, embodied in four documents, which governs the "working out" of debts owed by respondents -- Manuel Kaplan, his wife, and his wholly owned investment company, MK Investments, Inc. (MKI) -- to petitioner First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange. When First Options' demands for payment went unsatisfied, it sought arbitration by a stock exchange panel. MKI, which had signed the only workout document containing an arbitration agreement, submitted to arbitration, but the Kaplans, who had not signed that document, filed objections with the panel, denying that their disagreement with First Options was arbitrable. [****2] The arbitrators decided that they had the power to rule on the dispute's merits and ruled in First Options' favor. The District Court confirmed the award, but the Court of Appeals reversed. In finding that the dispute was not arbitrable, the Court of Appeals said that courts should independently decide whether an arbitration panel has jurisdiction over a dispute, and that it would apply ordinary standards of review when considering the District Court's denial of respondents' motion to vacate the arbitration award.

Held:

- 1. The arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts. Pp. 942-947.
- (a) The answer to the narrow question whether the arbitrators or the courts have the primary power to decide whether the parties agreed to arbitrate a dispute's merits is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, e. g., Mastrobuono v. Shearson Lehman Hutton, Inc., ante, at 52, so the question "who has the primary power to decide arbitrability" turns upon whether the parties agreed to submit that question to arbitration. If so, then [****3] the court should defer to

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the arbitrator's arbitrability decision. If not, then the court should decide the question independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties. Pp. 942-943.

- (b) The Kaplans did not agree to arbitrate arbitrability. Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists. However, courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so. See, e. g., AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415. First Options cannot show a clear agreement on the part of the Kaplans. The Kaplans' objections to the arbitrators' jurisdiction indicate that they did not want the arbitrators to have binding authority over them. This conclusion is supported by (1) an obvious explanation for their presence before the arbitrators (i. e., Mr. Kaplan's wholly owned firm was arbitrating workout agreement matters); and (2) Third Circuit law, which suggested that they might argue arbitrability [****4] to the arbitrators without losing their right to independent court review. First Options' counterarguments are unpersuasive. Pp. 943-947.
- 2. Courts of appeals should apply ordinary standards when reviewing district court decisions upholding arbitration awards, i. e., accepting findings of fact that are not "clearly erroneous" but deciding questions of law de novo; they should not, in those circumstances, apply a special "abuse of discretion" standard. It is undesirable to make the law more complicated by proliferating special review standards without good reason. More importantly, a court of appeals' reviewing attitude toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result. Nothing in the Arbitration Act supports First Options' claim that a court of appeals should use a different standard when conducting review of certain district court decisions, Pp. 947-949.
- 3. The factbound question whether the Court of Appeals erred in its ultimate conclusion that the dispute was not arbitrable is beyond the scope of the questions this Court agreed to review. P. 949.

Counsel: <u>James D. Holzhauer</u> → argued the cause for petitioner. With him on the briefs were <u>Timothy S. Bishop</u> →, <u>Stephen P. Bedell</u> →, Timothy G. McDermott ▼, and Kenneth E. Wile ▼.

John G. Roberts, Jr. 🔻, argued the cause for respondents. With him on the brief for respondent Manuel Kaplan were Donald L. Perelman 🕶, Richard A. Koffman, and David G. Leitch. Gary A. Rosen filed a brief for respondent Carol Kaplan. **

Judges: BREYER ▼, J., delivered the opinion for a unanimous Court.

Opinion by: BREYER ₩

Opinion

<u>LEGHN[1A]</u> [1A] <u>**LEGHN[2A]** [7] [2A] <u>**LEGHN[3A]**</u> [3A] In this case we consider two questions about how courts should review certain</u> matters under the federal Arbitration Act, 9 U.S.C. § 1 et seq. (1988 ed. and Supp. V): (1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award.

[****5] I

The case concerns several related disputes between, on one side, First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange, and, on the other side, three parties: Manuel Kaplan; his wife, Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center on a "workout" agreement, embodied in four separate documents, which governs the "working out" of debts to First Options that MKI and the Kaplans incurred as a result of [****6] the October 1987 stock market crash. In 1989, after entering into the agreement, MKI lost an additional \$ 1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration by a panel of the Philadelphia Stock Exchange.

[*941] MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that document, denied that their disagreement with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favor of First Options. The Kaplans then asked the Federal District Court to vacate the arbitration award, see 9 U.S.C. § 10 (1988) ed., Supp. V), and First Options requested its confirmation, see § 9. The court confirmed the award. Nonetheless, on appeal the Court of Appeals for the Third Circuit agreed with the [****7] Kaplans that their dispute was not arbitrable; and it reversed the District Court's confirmation of the award against them. 19 F.3d 1503 (1994).

We granted certiorari to consider [***992] two questions regarding the standards that the Court of Appeals used to review the determination that the Kaplans' dispute with First [**1923] Options was arbitrable. 513 U.S. 1040 (1994). First, the Court of Appeals said that courts "should independently decide whether an arbitration panel has jurisdiction over the merits of any particular dispute." 19 F.3d at 1509 (emphasis added). First Options asked us to decide whether this is so (i. e., whether courts, in "reviewing the arbitrators' decision on arbitrability," should "apply a de novo standard of review or the more deferential standard applied to arbitrators' decisions on the merits") when the objecting party "submitted the issue to the arbitrators for decision." Pet. for Cert. i. Second, the Court of Appeals stated that it would review a district court's denial of a motion to vacate a commercial arbitration award (and the correlative grant of a motion to confirm it) "de novo." 19 F.3d at 1509. [****8] First Options argues that the Court of Appeals instead should have applied an "abuse of discretion" standard, See Robbins v. Day, 954 F.2d 679, 681-682 (CA11 1992),

[*942] II

LEGHNI 18 [* 18] The first question -- the standard of review applied to an arbitrator's decision about arbitrability -- is a narrow one. To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the merits of the dispute. Second, they

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disagree about whether they agreed to arbitrate the merits. That disagreement is about the arbitrability of the dispute. Third, they disagree about who should have the primary power to decide the second matter. Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.

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LEGHN[4] [4] Although the question is a narrow one, it has a certain practical importance. That is because HN1 a party who has not agreed [****9] to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e. g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); Wilko v. Swan, 346 U.S. 427, 436-437, 98 L. Ed. 168, 74 S. Ct. 182 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989). Hence, who -- court or arbitrator -- has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

[*943] We believe the answer to the "who" question (i. e., the standard-of-review question) is fairly simple. Just as HNZ* the arbitrability of the merits of a dispute [****10] depends upon whether the parties agreed to arbitrate that dispute, see, e. g., Mastrobuono v. Shearson Lehman Hutton, Inc., ante, at 57; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about that matter. HN3* Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (parties may agree to arbitrate arbitrability); Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583, n. 7, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, e. g., 9 [**1924] U.S.C. § 10. [****11] If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration. See, e. g., AT&T Technologies, supra, at 649; Mastrobuono, ante, at 57-58, and n. 9; Allied-Bruce Terminix Cos. v. Dobson, [***993] 513 U.S. 265, 271, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995); Mitsubishi Motors Corp., supra, at 625-626.

We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Nevertheless, [*944] that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard-of-review question requires a word about how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration. [****12] And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here.

HN4 When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. See, e. g., Mastrobuono, ante, at 62-63, and n. 9; Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 475-476, 103 L.

Ed. 2d 488, 109 S. Ct. 1248 (1989); Perry v. Thomas, 482 U.S. 483, 492-493, n. 9, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987); G. Wilner, 1 Domke on Commercial Arbitration § 4:04, p. 15 (rev. ed. Supp. 1993) (hereinafter Domke). The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. See, e. g., Estate of <u>Jesmer v. Rohlev, 241 III, App. 3d 798, 803, 609 N.E.2d 816, 820, 182 III, Dec. 282 (1993)</u> (law of the State whose law governs the workout agreement); Burkett v. Allstate Ins. Co., 368 Pa. Super. 600, 608, 534 A.2d 819, 823-824 (1987) [****13] (law of the State where the Kaplans objected to arbitrability). See generally Mitsubishi Motors, supra, at 626.

[***994] This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: HNS Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. AT&T Technologies, supra, at 649; see Warrior & Gulf, supra, at 583, n. 7. In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because [*945] it is within the scope of a valid arbitration agreement" -- for in respect to this latter question the law reverses the presumption. See Mitsubishi Motors, supra, at 626 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)); [****14] Warrior & Gulf, supra, at 582-583.

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, see, e. g., Mitsubishi Motors, supra, at 626, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter. See Domke § 12.02, p. 156 (HN6* issues will be deemed arbitrable unless "it is clear that the arbitration [**1925] clause has not included" them). On the other hand, the former question -- the "who (primarily) should decide arbitrability" question -- is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508-1509 (1959), cited in Warrior & Gulf, 363 U.S. at 583, n. 7. And, given the principle that HNZ* a party can be forced to [****15] arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. Ibid. See generally Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985) (Arbitration Act's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

[*946] LEGHN[1C]* [1C]On the record before us, First Options cannot show that the Kaplans clearly agreed to have the arbitrators decide (i. e., to arbitrate) the question of arbitrability. First Options relies on the Kaplans' filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction. But HN8 merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i. e., a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the [***995] Kaplans were forcefully [****16] objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did not want the arbitrators to have binding authority over them. This conclusion draws added support from (1) an obvious explanation for the Kaplans' presence before the arbitrators (i. e., that MKI, Mr. Kaplan's wholly owned firm, was arbitrating workout agreement matters); and (2) Third Circuit law that suggested that the Kaplans might argue arbitrability to the arbitrators without losing their right to independent court

review, Teamsters v. Western Pennsylvania Motor Carriers Assn., 574 F.2d 783, 786-788 (1978); see 19 F.3d at 1512, n. 13.

LEGHN[1D] [1D]LEGHN[5] [5]LEGHN[6] [6] [6] First Options makes several counterarguments: (1) that the Kaplans had other ways to get an independent court decision on the question of arbitrability without arguing the issue to the arbitrators (e. g., by trying to enjoin the arbitration, or by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration, see 9 U.S.C. 6 4); (2) that permitting parties [****17] to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of disputes; and (3) that the Arbitration Act therefore requires a presumption that the Kaplans agreed to be bound by the arbitrators' decision, not the contrary. The first of these points, however, while true, simply does not say anything about whether the Kaplans intended to be bound by the arbitrators' decision. The second point, too, is inconclusive, [*947] for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process. And, the third point is legally erroneous, for there is no strong arbitration-related policy favoring First Options in respect to its particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, Dean Witter Reynolds, supra, at 219-220, but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms," Mastrobuono, ante, at 54 [****18] (quoting Volt Information Sciences, 489 U.S. at 479), and according to the intentions of the parties, Mitsubishi Motors, 473 U.S. at 626. See Allied-Bruce, 513 U.S. at 271. That policy favors the Kaplans, not First Options.

LEGHN[1E] [1E] We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that [**1926] the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.

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LEGHN[28] [28] We turn next to the standard a court of appeals should apply when reviewing a district court decision that refuses to vacate, see 9 U.S.C. § 10 (1988 ed., Supp. V), or confirms, see § 9, an arbitration award. Although the Third Circuit sometimes used the words "de novo" to describe this standard, its opinion [***996] makes clear that it simply believes (as do all Circuits but one) that there is no special standard governing its review of a district court's decision in these circumstances. Rather, review of, for example, HN9 a [****19] district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration should proceed like review of any other district court decision finding [*948] an agreement between parties, e. g., accepting findings of fact that are not "clearly erroneous" but deciding questions of law de novo. See 19 F.3d at 1509.

One Court of Appeals, the Eleventh Circuit, has said something different. Because of federal policy favoring arbitration, that court says that it applies a specially lenient "abuse of discretion" standard (even as to questions of law) when reviewing district court decisions that confirm (but not those that set aside) arbitration awards. See, e. g., Robbins v. Day, 954 F.2d at 681-682. First Options asks us to hold that the Eleventh Circuit's view is correct.

<u>LEGHN[2C]</u> 7 [2C] <u>LEGHN[7]</u> 7] <u>LEGHN[8]</u> 8] We believe, however, that the majority of Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards. For one thing, it is undesirable to make the law more complicated by proliferating review [****20] standards without good reasons. More importantly, HN10**

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the reviewing attitude that a court of appeals takes toward a district court decision should depend upon "the respective institutional advantages of trial and appellate courts," not upon what standard of review will more likely produce a particular substantive result. Salve Regina College v. Russell, 499 U.S. 225, 231-233, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991). The law, for example, tells all courts (trial and appellate) to give administrative agencies a degree of legal leeway when they review certain interpretations of the law that those agencies have made. See, e. g., Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). But no one, to our knowledge, has suggested that this policy of giving leeway to agencies means that a court of appeals should give extra leeway to a district court decision that upholds an agency. Similarly, courts grant arbitrators considerable leeway when reviewing most arbitration decisions; but that fact does not mean that appellate courts should give extra leeway to district courts that uphold arbitrators. First Options [****21] argues that the Arbitration Act is special because the Act, in one [*949] section, allows courts of appeals to conduct interlocutory review of certain antiarbitration district court rulings (e. g., orders enjoining arbitrations), but not those upholding arbitration (e. g., orders refusing to enjoin arbitrations). 9 U.S.C. § 16 (1988 ed., Supp. V). But that portion of the Act governs the timing of review; it is therefore too weak a support for the distinct claim that the court of appeals should use a different standard when reviewing certain district court decisions. The Act says nothing about standards of review.

LEGHN[2D] [2D] We conclude that the Court of Appeals used the proper standards for reviewing the District Court's arbitrability determinations.

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<u>LEdHN[3B]</u> [3B]Finally, First Options argues that, even if we rule against it on the standard-of-review questions, we <u>[***997]</u> nonetheless should hold that the Court of Appeals erred in its ultimate conclusion that the merits of the Kaplan/First Options dispute were not arbitrable. This [****22] factbound issue is beyond the scope of the questions we agreed to review.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

References

5 Am Jur 2d, Arbitration and Award 11, 15, 42, 51, 145, 161-163, 168, 171, 183-185; 69A Am Jur 2d, Securities Regulation--Federal 1102

3 Federal Procedure, L Ed, Arbitration 4:98, 4:111, 4:148; 30 Federal Procedure, L Ed, Securities Regulation 70:295.5

2A Am Jur Pl & Pr Forms (Rev), Arbitration and Award, Forms 173, 204

27 Am Jur Proof of Facts 3d 103, Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration

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44 Am Jur Trials 507, Alternative Dispute Resolution: Commercial Arbitration

9 USCS 1 et seq.

Federal Regulation of Securities, Annotated 1330

L Ed Digest, Appeal 1318, 1502; Arbitration 16

L Ed Index, Arbitration and Award; Securities Regulation

ALR Index, Arbitration and Award

Annotation References:

Contract containing arbitration agreement as subject to the stay and enforcement provisions of the United States Arbitration Act--federal cases. 100 L Ed 211, [****23] 18 L Ed 2d 1685.

Construction and application of 10(a-d) of United States Arbitration Act of 1947 (9 USCS 10(a-d)), providing grounds for vacating arbitration awards. 20 ALR Fed 295.

Participation in arbitration proceedings as waiver of objections to arbitrability. 33 ALR3d 1242.

Appealability of order or decree compelling or refusing to compel arbitration. 94 ALR2d 1071.

Footnotes

Briefs of amici curiae urging reversal were filed for the National Futures Association et al. by Daniel J. Roth; and for the Philadelphia Stock Exchange, Inc., et al. by Lydia Gavalis.

Gerald F. Rath, Steven W. Hansen, and Stuart J. Kaswell filed a brief for the Securities Industry Association as amicus curiae.

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APPENDIX C



🔺 Lumbermens Mut. Casualty Co. v. Borden Co., 268 F. Supp. 303

Copy Citation

United States District Court for the Southern District of New York

April 7, 1967

No. 64 Clv. 1580

Reporter

268 F. Supp. 303 * | 1967 U.S. Dist. LEXIS 9327 **

LUMBERMENS MUTUAL CASUALTY COMPANY, Plaintiff, v. The BORDEN COMPANY, Inc., Blackstone Mutual Insurance Company, Affiliated F.M. Insurance Company, United Engineers and Contractors, Inc., the Wickes Corporation, Vulcan-Cincinnati Corporation, and Monochem, Inc., Defendants Actions *

Core Terms

arbitration, foreign corporation, rights, transaction of business, discovery, arbitration clause, cause of action, summons, doing business, retroactively, engineering, services, courts, personal jurisdiction, pending arbitration, secretary of state, effective date, lawsuit, jurisdictional, unauthorized, negotiation, accidents, subrogee, parties, visits



Case Summary

Procedural Posture

subrogor, defendant insured.

Overview

Plaintiff Insurer filed a declaratory action against defendant, its insured (insured), and defendant engineering corporation (corporation) which was under contract to perform services for insured, to determine whether plaintiff was liable to insured for accidents at its chemical plant and whether corporation was responsible for the accidents. Plaintiff eventually settled with Insured, its subrogor. Because insured and corporation's contract contained a broad arbitration clause requiring arbitration as a condition precedent to any right of legal action, corporation moved to stay the proceedings pending arbitration. Plaintiff opposed the motion, arguing that corporation waived arbitration by raising it two years into the action and that plaintiff was not bound by the agreement because it was not a party to it. The court disagreed, holding that corporation did not waive arbitration where it had not yet filed an answer and that plaintiff, as subrogee of a party to the agreement, was bound by the agreement.

Outcome

The court found that it had jurisdiction over defendant corporation but granted corporation's motion to stay the proceedings pending arbitration because corporation did not waive arbitration and plaintiff, as subrogee of a party to the agreement, was bound by the agreement.

▼ LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction ▼ > In Personam Actions ▼ > General Overview ▼

HN1 In Rem & Personal Jurisdiction, In Personam Actions

See N.Y. Bus. Corp. Law 5 307(a). Q More like this Headnote

Shepardize - Narrow by this Headnote (1)

Civil Procedure > ... > In Rem & Personal Jurisdiction ▼ > In Personam Actions ▼ > General Overview ▼

HN2 In Rem & Personal Jurisdiction, In Personam Actions

See N.Y. Bus. Corp. Law § 103(d). Q More like this Headnote

Shepardize - Narrow by this Headnote (0)



Governments > Legislation → > Effect & Operation → > Prospective Operation ▼

HN3 In Rem & Personal Jurisdiction, In Personam Actions

A cause of action is not "affected" if substantive rights or obligations are not enlarged or impaired. A more like this Headnote

Shepardize - Narrow by this Headnote (0)

Civil Procedure > ... > In Rem & Personal Jurisdiction → > In Personam Actions → > General Overview → Governments > Legislation → > Effect & Operation → > Patrospective Operation →

#N4₺ In Rem & Personal Jurisdiction, In Personam Actions

N.Y. Bus. Corp. Law § 307 applies retroactively. Q More like this Headnote

Shepardize - Narrow by this Headnote (1)

Business & Corporate Compliance > ... > Business & Corporate Law → > Foreign Corporations → > Noncompliance → Civil Procedure > ... > In Rem & Personal Jurisdiction → > In Personam Actions → > General Overview → View more legal topics

HN5 2 Businesses & Corporations, Foreign Corporation Noncompliance

N.Y. Bus. Corp. Law § 307(a) permits the New York Secretary of State to receive process on behalf of an unauthorized foreign corporation when the defendant corporation transacts business in New York and the cause of action arises out of such transaction of business. Q More like this Headnote

Shepardize - Narrow by this Headnote (5)

Civil Procedure > ... > In Rem & Personal Jurisdiction ▼ > In Personam Actions ▼ > General Overview ▼ Governments > Legislation → > Effect & Operation → > Propertive Operation → View more legal topics

#N6[±] In Rem & Personal Jurisdiction, In Personam Actions

N.Y. C.P.L.R. 6 302 has retroactive effect to the extent of embracing suits instituted after its effective date, but based on previously accrued causes of action, Q More like this Headnote

Shepardize - Narrow by this Headnote (1)



International Trade Law > Dispute Resolution ➤ International Commercial Arbitration ➤ Arbitration ➤

HNZ Alternative Dispute Resolution, Judicial Review

See 9 U.S.C.S. § 3 (1964). A More like this Headnote

Shepardize - Narrow by this Headnote (0)

Business & Corporate Compliance > ... > Pretrial Matters ➡ > Alternative Dispute Resolution ➡ > Judicial Review ➡ Civil Procedure > ... > Alternative Dispute Resolution ▼ > Arbitration ▼ > General Overview ▼

HN8 Alternative Dispute Resolution, Judicial Review

Any doubts as to the construction of the United States Arbitration Act ought to be resolved in line with its liberal policy of promoting arbitration to accord with the original intention of the parties. In this regard, no walver can be found unless a party acts inconsistently with its right to arbitrate. Where a party who has agreed to arbitrate any controversy that may arise prefers to take a controversy to court in the ordinary way, there comes a time in the course of the litigation when it would be unfair to permit one side to resort to arbitration over the protest of the other. That time is reached when the defendant files an answer on the merits, joining with plaintiff in rejecting arbitration and tendering the controversy to the court for trial. A More like this Headnote

Shepardize - Narrow by this Headnote (7)

Business & Corporate Compliance > ... > Contracts Law → > Contract Conditions & Provisions → > Arbitration Clauses → Civil Procedure > ... > <u>Alternative Dispute Resolution</u> ▼ > <u>Arbitration</u> ▼ > <u>General Overview</u> ▼ View more legal topics

HN9 Contract Conditions & Provisions, Arbitration Clauses

A court should more easily find a walver of arbitration by the plaintiff since it is the plaintiff who has set the judicial machinery in motion In spite of the existence of an arbitration clause. Q More like this Headnote

Shepardize - Narrow by this Headnote (9)

Civil Procedure > ... > Alternative Dispute Resolution ▼ > Arbitration ▼ > General Overview ▼

HN10 Alternative Dispute Resolution, Judicial Review

There is no waiver of arbitration when a party demands arbitration for the first time in its answer. A More like this Headnote



HN112 Alternative Dispute Resolution, Judicial Review

Delay alone in moving for an arbitration order will not amount to a default. Q More like this Headnote

Shepardize - Narrow by this Headnote (2)

Business & Corporate Compliance > ... > Contracts Law → > Contract Conditions & Provisions → > Arbitration Clauses → Civil Procedure > ... > Alternative Dispute Resolution ▼ > Arbitration ▼ > General Overview ▼ Contracts Law > Third Parties > Subrogation >

View more legal topics

HN12 Contract Conditions & Provisions, Arbitration Clauses

An arbitration agreement is binding upon and enforceable against the subrogee of a party to the agreement. Q More like this Headnote

Shepardize - Narrow by this Headnote (4)

Counsel: [**1] Townjey, Updike, Carter & Rodgers . Philip D. Pakula, New York, New York, for plaintiff, W. Wright Danenbarger, Joseph P. Fazio, Miles F. McDonald, Jr., New York, New York, of counsel.

Burke & Burke, New York, New York, for defendants, J. Frederic Taylor, George I. Harrls, Marc J. Loost, New York, New York, of counsel.

Judges: Tenney w, District Judge.

Opinion by: TENNEY -

Opinion

[*305] MEMORANDUM

TENNEY, District Judge.

Defendant Vulcan-Cincinnati Corporation (hereinafter referred to as "Vulcan") seeks an order (a) dismissing plaintiff's complaint against it for lack of jurisdiction; (b) staying the action as against Vulcan pending arbitration; and (c) granting summary judgment in favor of defendant

MOTION TO DISMISS FOR LACK OF JURISDICTION

Vulcan claims that jurisdiction was never obtained over it by reason of three different services made by plaintiff on June 11, 1964, July 8, 1964 and May 6, 1966, respectively. The Court [**2] will consider each service separately.

June 11, 1964 service - It is conceded by Vulcan that this service conformed with the mechanical requirements of HNI Section 307(a) of the New York Business Corporation Law (hereinafter referred to as the "BCL"), McKinney's Consol.Laws, c. 4. This section, at the time of the June 11, 1964 service, read as follows:

(a) Every foreign corporation not authorized to do business in this state which itself or through an agent does any business in this state submits itself to the jurisdiction of the courts of this state and is deemed to have designated the secretary of state as its agent upon whom process against it may be served, in any action or special proceeding arising out of or in connection with the doing of such business. Such process may issue in any court in this state having jurisdiction of the subject matter.

However, Vulcan contends that said service was invalid for two reasons: (a) the BCL is inapplicable to any daims or liabilities accruing prior to its effective date; (b) assuming that the BCL can be applied retroactively, Vuican is not "doing business" in New York in the traditional sense as is required by BCL § 307.

[**3] In support of its first contention, Vulcan relies on HN2 BCL § 103(d) which reads as follows:

(d) This chapter shall not affect any cause of action, liability, penalty or action or special proceeding, which on the effective date of this chapter, is accrued, existing, incurred or pending but the same may be asserted, enforced, prosecuted or defended as if this chapter had not been enacted.

Vulcan argues that since the incidents upon which plaintiff's suit is based occurred in 1962 and since the BCL did not become effective until September 1, 1963, BCL 5 307(a) was unavailable to plaintiff in this instance. However, Vulcan's interpretation of BCL 5 103(d) ignores the plain meaning of the statute and is logically unsound.

Section 103(d) of the BCL does not state that this chapter shall not apply to any cause of action or liability accrued or existing on its effective date, but rather states that this chapter shall not affect any such cause of action or liability, HNST A cause of action is not "affected" if substantive rights or obligations are not enlarged or impaired. See Simonson v. International Bank. 14 N.Y.2d 281, 251 N.Y.S.2d 433, 200 N.E.2d 427 (1964).



That BCL [**4] § 307(a) is a service statute is clear from the fact that the section is entitled "Service of process on unauthorized foreign corporation" and is contained in Article 3 of the BCL which is titled "Corporate Name and Service of Process". If all BCL 6 307(a) does is provide for a new type of service on an unauthorized foreign corporation, it cannot be held to affect the substantive rights of the parties to the law suit.

action. In the context of this case BCL § 307 neither enlarges nor impairs plaintiff's substantive rights against Vulcan. At most, the section merely makes another forum available to plaintiff for rights that are already enforceable. Hence, Vulcan's contention that BCL § 307(a) should not be applied retroactively is unsound.

Additionally, and for reasons to be discussed infra, BCL 6 307(a) provides for [*307] a method of service on foreign corporations when jurisdiction [**5] is obtainable under the "transacting business" standards of the New York long-arm statute, CPLR 5 302. Since CPLR 5 302. has clearly been held to apply retroactively, HN47 Simonson v. International Bank, supra, BCL § 307 which merely provides an additional method of service when long-arm jurisdiction is attainable, should also be held to apply retroactively.

Secondly, Vuican argues that even if BCL § 307(a) is held to apply retroactively, Vuican is not "doing business" in New York in the traditional sense as is required by BCL § 307(a). However, after careful consideration of the language and purposes behind BCL § 307(a), it is this Court's conclusion that this section embodies the "transacting business" test of CPLR § 302. 1 ±

To begin with, as it read in 1963, BCL § 307(a) provided for service on [**6] an unauthorized foreign corporation that "does any business" in New York. The fact that the legislature used the word "any" is significant. If it had been intended merely to codify the traditional "doing business" test, there would have been no reason to include the word "any" in the statute. In addition, BCL § 307(a) authorized service on the Secretary of State "in any action * * * arising out of or in connection with the doing of such business." If Vulcan's argument is correct, the Court would be asked to hold that when the legislature enacted BCL 5 307, it further limited the amenability of a foreign corporation to suit in New York by stating that not only must such corporation be doing business in New York, but that the cause of action must arise out of the doing of such business. That the legislature would have desired to limit a foreign corporation's amenability to suit in New York seems highly unlikely. In fact, in Professor Hornstein's analysis of the BCL (McKinney's BCL, Appendix 1, at 476 (1963)), it is pointed out that the effect of provisions such as BCL § 307 was to extend potential jurisdiction over foreign corporations in line with the United States Supreme [**7] Court's decision in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

When one looks at the language of BCL § 307(a) as it read in 1964 ("does any business" and "arising out of or in connection with the doing of such business"), it bears a striking resemblance to the language of CPLR § 302 ("transacts any business" and "arising from any of the acts enumerated"). Indeed, both statutes became effective on the same date. Furthermore, when both statutes are read together, the legislative Intent appears obvious. 2 . Section 302 of the CPLR provides a basis for obtaining personal jurisdiction over a foreign corporation within New York. CPLR 6 313 provides the normal method for serving foreign corporations that are amenable to sult under CPLR 6 302. As has been discussed previously, BCL § 307(a) is solely a service statute. What it really does is provide for another method of service on a foreign corporation that is amenable to jurisdiction under CPLR § 302. The differences in the language of the two statutes is slight. Whatever differences there are may be accounted for by the fact that the BCL and the CPLR were prepared by two distinct [**8] bodies (Joint Legislative Committee to Study Revision of Corporation Laws and New York State Law Revision Commission), were conceived for different purposes, and were drafted at different times.



Nothing shows the relationship between CPLR § 302 and BCL § 307(a) [*308] more clearly than the 1965 amendment to BCL § 307(a) which reads as follows:

jurisdiction. In any such case, process against such foreign corporation may be served upon the secretary of state as its agent. Such process may issue in any court in this state having jurisdiction of the subject matter.

Doubtless, [**9] this amendment was enacted to overcome the difference in language between BCL § 307(a) and CPLR § 302 and to clarify the fact that BCL § 307(a) is a service statute that may be resorted to when jurisdiction over a foreign corporation is attainable under CPLR § 302. Nowhere is the purpose of the clarifying amendment to BCL 5 307(a) stated more succinctly than in Professor Hornstein's commentary (McKinney's BCL, Appendix 1 at 43 (Supp.1966)).

"Section 307 authorizing service upon the Secretary of State as agent for an unauthorized foreign corporation which 'does any business in this state' * * * did not conform to the language of CPLR § 302 on the same subject. The former provision has therefore been replaced by a tie-in to the latter."

Hence it is clear that notwithstanding two cases to the contrary, 3.₺ HN5 BCL § 307(a) permits the Secretary of State to receive process on behalf of an unauthorized foreign corporation when the defendant corporation transacts business in this state and the cause of action arises out of such transaction of business.

101 Turning to the facts of this case, it is clear that the acts performed by Vuican in New York constituted the transaction of business here and that the instant cause of action arose out of such transaction of business. In contrast to the scattered activity of Catalysts and Chemicals, Inc. (hereinafter referred to as "Catalysts") in New York, which led this Court to dismiss plaintiff's complaint as against Catalysts (see Lumbermens Mutual Casualty Company v. Borden Co., S.D.N.Y., 265 F. Supp. 99, Jan. 31, 1967), Vulcan's activities in New York were quite substantial. Whereas Catalysts never entered into a contract with The Borden Company (hereinafter referred to as "Borden"), Vuican did enter into such a contract, and, moreover, said contract was executed in New York. Whereas Catalysts representatives visited New York at most on two occasions in connection with the negotiation of the Vulcan-Borden contract, Vulcan representatives visited New York on twenty-four different occasions in connection with the negotiations of said contract. Whereas Catalysts representatives made at most two visits to New York subsequent to the execution of the Vulcan-Borden contract, and both such visits [11] concerned settlement discussions, Vulcan representatives made nine such visits, several of which concerned performance of the contract.

In Liquid Carriers Corp. v. American Marine Corp., 2d Cir., 375 F.2d 951, Feb. 28, 1967, the Court of Appeals held that substantial preliminary negotiations conducted in New York, but unaccompanied by other activities after execution of the negotiated contract, were enough to meet the statutory requirements for the transaction of business under CPLR § 302. In the instant case, Vulcan's extensive activities in New York in connection with the Vulcan-Borden contract provide a much stronger basis for this Court to conclude that Vulcan was transacting business in



Furthermore, the Court cannot agree with Vulcan's contention that the Instant cause of action did not arise out [*309] of Vulcan's transaction of business in New York. Plaintiff's claims against Vulcan arise out of several accidents that occurred at Borden's chemical Plant in Geismar, Louislana. According to the Vulcan-Borden contract, Vulcan was to provide engineering design and procurement services and certain services of erection and operation engineers for the Borden plant. [**12] It is plaintiff's contention that Vulcan's actions pursuant to the

with Borden in New York. See Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965).

July 8, 1964 service - Before a determination of the validity of this service can be made, a brief review of the history of defendant Vulcan is in order. Until March 17, 1964, the moving defendant was named Vulcan-Cincinnati, Inc.; since March 17, 1964, its name has been Vulcan-Cincinnati Corp. On that same date, a new corporation, Vulcan-Cincinnati, Inc., was organized. The new corporation purchased the assets of the engineering division of defendant Vulcan-Cincinnati Corp. and assumed all the engineering liabilities (including the type involved in this case) of that defendant. At a hearing held on July 1, 1966, counsel for defendant Vulcan admitted that it was merely a shell corporation, [**13] having a tax refund claim as a reason for its existence. Mr. Wentworth, Chairman of the Board of Vulcan-Cincinnati, Inc., was President of defendant Vulcan-Cincinnati Corp.; Mr. Feng, Director of Project Management of Vulcan-Cincinnati, Inc., was a Project Manager of defendant Vulcan-Cincinnati Corp. Both defendant Vulcan-Cincinnati Corp. and Vulcan-Cincinnati, Inc., gave their address as 120-126 Sycamore Street, Cincinnati, Ohio.

Plaintiff attempted to make service on defendant Vulcan-Cincinnati Corp. pursuant to CPLR § 313 by instructing the Marshal in the Southern District of New York to transmit an additional summons to the Marshal in Cincinnati for personal service, in Cincinnati, upon defendant Vulcan-Cincinnati Corp. The Marshal's return, dated July 8, 1964, stated as follows:

On the above date I received this Additional Summons & Complaint at Cincinnati, Ohio and served the VULCAN-CINCINNATI CORPORATION, by personal service on Dr. W. H. *K, President of Vulcan-Cincinnati Corporation, in his office located at 120-26 Sycamore St., Cincinnati, Ohio at approximately 2:30 PM. Dr. *K after accepting this service, called his attorney and after talking to his attorney, [**14] advised this deputy that he was not accepting this service voluntary and wanted this refusal noted in the return.

Dr. Stark, however, was not in any way connected with defendant Vulcan-Cincinnati Corp., but was President of Vulcan-Cincinnati, Inc.

From these facts, it is apparent that plaintiff unwittingly served the wrong corporation, but that knowledge of such service was most certainly communicated to defendant Vulcan-Cincinnati Corp. The close similarity in the names of the two corporations, that one came into existence only two months before the commencement of this law suit, that both were located at the same address, that the new corporation assumed the liabilities of the old one, that the two corporations had certain officers and directors in common, that the Marshal's return did not mention the reason for Dr. Stark's objection to the service and the fact that defendant Vulcan-Cincinnati Corp. waited almost two years before it attempted to challenge this service (April 15, 1966) were all factors that plaintiff was entitled to rely upon to assume that service had been properly made. Furthermore, the only logical inference to be drawn was that Dr. Stark promptly notified [**15] [*310] defendant Vulcan-Cincinnati Corp. of the July 8, 1964 service.



In Marcy v. Woodin, 18 A.D.2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963), service was sustained where a summons, mistakenly delivered to the son of the defendant, was turned over by the son to his father. In Erale v. Edwards, 47 Misc. 2d 213, 262 N.Y.S. 2d 44 (Sup. Ct. 1965), service was sustained when the summons was delivered to the defendant by the janitor of the apartment building where the defendant resided after the janitor had found the summons in an empty apartment. And in Green v. Morningside Heights Housing Corp., 13 Misc. 2d 124, 177 N.Y.S. 2d

applicable statute, each service did accomplish its Intended purpose – giving fair and adequate notice to the defendant of the commencement of an action against him. These decisions emphasize "good sense and common business practice" and "are correct in stressing effective and fair notice as the [**16] proper criteria." 1 Weinstein-Korn-Miller, New York Civil Practice Para. 311.06, at 3-114 (1965). Or as stated by Professor McLaughlin, "Where the summons eventually gets to the person intended to be served, and this is admitted by all, it is difficult to justify formal insistence upon the letter of the statute. McKinney's CPLR, 1964 Supplementary Practice Commentary to CPLR § 308, at 114 (Supp.1966). But cf. Ziembicki v. Mott Improvement Corp., 18 A.D.2d 926, 238 N.Y.S.2d 202 (2d Dep't 1963); Paul v. Weiss, 48 Misc.2d 683, 265 N.Y.S.2d 687 (Sup.Ct.), aff'd, 24 A.D.2d 1054, 265 N.Y.S.2d 625 (3d Dep't 1965).

Here, all indications point to the fact that the July 8, 1964 summons was transmitted to defendant Vulcan-Cincinnati Corp. Nowhere in any of the papers attacking the validity of this service is there any claim that defendant Vulcan-Cincinnati Corp. never received the summons; rather, the only claim is the hypertechnical one that the wrong corporation was served in the first instance. Hence, it is this Court's conclusion that the July 8, 1964 service compiled with the requirements of CPLR § 313 and must be upheld. This result is fully in line with the "trend away from the [**17] formalism of earlier generations which refused to countenance a mistake in service even in those cases where it conclusively appeared that the defendant was subsequently served by the person who was mistaken for the defendant." McLaughlin, 1966 Supplementary Practice Commentary to CPLR § 308, at 109 (Supp.1966).

Defendant Vulcan further argues that it was impermissible for plaintiff to make multiple services in the same action since the June 11, 1964 service had not been quashed, modified or abandoned at the time of the July 8, 1964 service. Vulcan has failed to cite any competent authority for its novel proposition. In addition, in the circumstances of this case, the Court falls to see how this second service could constitute harassment or oppression of the defendant Vulcan. To the contrary, all indications point to the fact that the second service was attempted for good reason – plaintiff was not certain whether the prior service under BCL § 307 would be upheld.

Finally, it is to be noted that on July 8, 1964, plaintiff served defendant Vulcan pursuant to CPLR § 313 in an attempt to acquire jurisdiction over Vulcan under CPLR § 302. Since it has already been shown supra [**18] that Vulcan was "transacting business" in New York within the meaning of CPLR § 302, jurisdiction under that statute was properly acquired. There is no merit to Vulcan's contention that CPLR § 302 [*311] ought not to be applied retroactively in this instance. The Court finds no special circumstances to justify an exception to the rule that HING CPLR § 302 has retroactive effect to the extent of embracing suits instituted after its effective date, but based on previously accrued causes of action. Simonson v. International Bank, supra.

May 6, 1966 service - Since the Court has already determined that both the June 11, 1964 service and the July 8, 1964 service were proper, the validity of the third and final service need not be considered.



MOTION FOR STAY PENDING ARBITRATION

On January 24, 1961, Vulcan and Borden entered into an agreement whereby Vulcan agreed to render certain engineering and procurement services for Borden's chemical plant in Geismar, Louislana. Article XXXV of said agreement contained a broad arbitration clause which read as follows:

Society of America, Inc. The decision of such an arbitration shall be a condition precedent to any right of legal action. The arbitrators shall determine all questions of law involved, including the interpretation, construction and performance under the Contract, by reference to the Ohio Law.

In 1962, several accidents occurred at the Borden plant which caused substantial damage. On April 8, 1964, plaintiff commenced this action seeking a declaratory judgment that it was not liable to Borden with respect to these accidents which Borden claims were covered by two policies of insurance issued by plaintiff. To the extent plaintiff may be held liable to Borden, plaintiff also sought a declaratory judgment against the other named defendants, including Vulcan, who it claims were responsible for the various accidents.

On June 29, 1964, Vulcan moved to dismiss the complaint as against it for lack of personal jurisdiction and to stay discovery on the merits pending the determination of the jurisdictional question. Shortly thereafter, plaintiff [**20] stipulated with Vulcan that determination of its objections to personal jurisdiction would be deferred pending discovery on the limited question of personal jurisdiction. Vulcan's jurisdictional motion was eventually withdrawn without prejudice. Vulcan's time to move or answer was extended, pending termination of the limited discovery called for by the stipulation. Discovery was then deferred for a substantial period pending the determination by this Court of several motions made by other defendants. These motions were denied on January 4, 1965.

On January 13, 1966, Vulcan was informed that Borden had reached a settlement of its claims against plaintiff. Shortly thereafter, the Court fixed certain dates (subsequently extended) for the submission of motions by Vulcan. On April 15, 1966, Vulcan filed the instant motion for a stay pending arbitration.

Plaintiff opposes Vulcan's motion for a stay pending arbitration on two distinct grounds: (1) Vulcan has waived its right to arbitration; (2) plaintiff, as Borden's subrogee, is not bound by the arbitration clause.

To sustain its contention that Vulcan has defaulted in proceeding with arbitration, plaintiff relies on HNZ 9 U.S.C. 6 [**21] 3 (1964) which reads as follows:

If any sult or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such sult or proceeding is referable to arbitration under such an agreement, [*312] shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Plaintiff claims the fact that Vulcan did not move for a stay pending arbitration until two years after the action was commenced, that in the intervening time Vulcan has made a motion to dismiss on jurisdictional grounds without asserting its arbitration rights, that Vulcan has participated in lengthy and extensive discovery on the question of personal jurisdiction, and that Vuican never indicated to plaintiff its desire to arbitrate until the instant motion, constitute the type of activity which should compel the Court to conclude that Vuican is in default [**22] in proceeding with arbitration. Plaintiff further claims that Vulcan's delay in seeking arbitration has prejudiced plaintiff since in the intervening

In Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959), appeal dismissed, 364 U.S. 801, 81 S. Ct. 27, 5 L. Ed. 2d 37 (1960), the Court of Appeals stated that HNS "[Any] doubts as to the construction of the [United States Arbitration] Act ought to be resolved in line with its liberal policy of promoting arbitration * * * to accord with the original intention of the parties. * * ** The Court further declared that no waiver can be found unless a party acts inconsistently with its right to arbitrate.

The time at which a party will be deemed to have waived arbitration by inconsistent court action was aptly stated in The Belize, 25 F. Supp. 663, 664 (S.D.N.Y.1938), appeal dismissed, 101 F.2d 1005 (2d Clr. 1939) (per curiam), [**23] wherein the Court stated:

"Where a party who has agreed to arbitrate any controversy that may arise prefers to take a controversy to court in the ordinary way, there comes a time in the course of the litigation when it would be unfair to permit one side to resort to arbitration over the protest of the other. That time is reached when the defendant files an answer on the merits, joining with plaintiff in rejecting arbitration and tendering the controversy to the court for trial."

Turning to the facts of the instant case, several things are apparent. In the first place, it was plaintiff, not Vulcan, who instituted the present suit. HNST A Court should more easily find a waiver of arbitration by plaintiff since it is the plaintiff who has set the judicial machinery in motion in spite of the existence of an arbitration clause. See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F,2d 978, 989 (2d Cir. 1942).

Secondly, Vulcan has not even filed an answer in this suit. Courts in this circuit have consistently held that HN107 there is no waiver when a party demands arbitration for the first time in its answer. Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra; Almacenes Fernandez, [**24] S.A. v. Golodetz, 148 F.2d 625 (2d Cir. 1945); Kulukundis Shipping Co. v. Amtorg Trading Corp., supra. Three cases on which plaintiff heavily relies, wherein the Court found waiver, are distinguishable since the party seeking the stay had answered the complaint, interposed a counterclaim and had taken further steps leading toward trial before it moved for a stay. Cornell & Co. v. Barber & Ross Co., 123 U.S.App.D.C. 378, 360 F.2d 512 (1966); American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948), cert. denied, 336 U.S. 909, 69 Ct. 515, 93 L. Ed. 1074 (1949): Radiator Specialty Co. v. Cannon [*313] Mills, 97 F.2d 318, 117 A.L.R. 299 (4th Cir. 1938).

Thirdly, while the Court agrees that there was delay between the time this suit was commenced and the time when Vulcan first moved for a stay, it is established that #N117 delay alone in moving for an arbitration order will not amount to a default. Almacenes Fernandez, S.A. v. Golodetz, supra.

Finally, an examination of Vulcan's intervening steps since the commencement of the action cannot be considered as amounting to a waiver. See Robert Lawrence Co. v. Devonshire Fabrics. Inc., supra, Soon after the sult [**25] was commenced, Vuican moved to dismiss the complaint against it for lack of jurisdiction. But shortly thereafter, Vulcan agreed to hold its motion in abeyance so that plaintiff could complete discovery as to the jurisdictional facts. Hence, when plaintiff complains about extended discovery, it is really plaintiff's own discovery, and not Vulcan's, which delayed the progress of this law suit.



Since, at the time the sult was commenced, there was no direct dispute between Vulcan and Borden or plaintiff, there was no need for Vulcan to then demand arbitration. However, the entire posture of the law sult changed radically in January 1966 when plaintiff settled with Borden. Then, for the first time, Vulcan could expect plaintiff to assert direct claims against it. No longer could Vulcan be considered secondarily, hypothetically or alternatively liable to plaintiff. Under such circumstances it was [**26] not unreasonable for Vulcan to seek arbitration for the first time in April 1966.

Finally, the Court places little weight on plaintiff's assertion that it settled with Borden in large part in the belief that it could pursue its claims against Vulcan in this Court. Not only does the Court doubt that this factor significantly influenced plaintiff's decision to settle with Borden, but, even if it did, the result would still be the same. Plaintiff must be charged with knowledge of the provisions of the Borden-Vuican contract, including the arbitration clause. Also, that none of the other defendants seek arbitration should have no bearing on whether this Court is to allow plaintiff's dispute with Vulcan to proceed to arbitration. This is especially so since there has been no showing that the contracts of the other defendants provided for arbitration, or, if so, that they could not have waived their rights without impairing those of Vuican.

Plaintiff further claims that, as subrogee, it is not bound by the arbitration provisions in the contract between its subrogor (Borden) and Vulcan. Both Ohio and New York have similar statutes which declare an arbitration agreement to be irrevocable [**27] and enforceable. 4± Although no decision has been found under either Ohlo or New York law stating that HN127 an arbitration agreement is binding upon and enforceable against the subrogee of a party to the agreement, many courts have enforced arbitration clauses against persons derivatively claiming rights under agreements containing such a dause. Psaty & Fuhrman, Inc. v. Continental Cas. Co., 278 App.Div. 159, 103 N.Y.S.2d 849 (1st Dep't 1951) (against surety); Cutting Room Appliances Corp. v. National Bronx Bank of New York. 97 N.Y.S.2d 363 (Sup.Ct.1950) (against assignee); Crompton-Richmond Co. v. William Neiligan, Inc., 2 Misc.2d 882, 151 N.Y.S.2d 154 (City Ct.1956) (against assignee). For other decisions holding that a person not a party to an arbitration agreement may become bound thereby see [*314] Fisser v. International Bank. 282 F.2d 231, 233, n. 6 (2d Clr. 1960).

Reasoning by analogy, there is no valid basis in law or equity why an arbitration [**28] clause should not be enforced against a subrogee. To hold otherwise would seriously impair the validity of arbitration clauses since either party could escape the effect of such a clause once he has settled with his insurer. Cf. Hosiery Mfrs. Corp. v. Goldston, 238 N.Y. 22, 143 N.E. 779 (1924). Furthermore, it is fundamental law that the insurer, as subrogee, stands in the place of the insured and succeeds to whatever rights or disabilities he may have in the matter. Hence, any rights which plaintiff has are only rights which Borden had, and if Borden's rights were subject to arbitration, plaintiff's rights are subject to arbitration.

Finally, plaintiff suggests that in any event the claim that Vulcan was negligent in performance of its services for Borden raises an issue outside the interpretation of the contract which would remain unresolved even after arbitration. But plaintiff's reading of Article XXXV of the Vulcan-Borden contract is unduly narrow. The arbitration clause states that all disputes concerning the "interpretation, construction and performance under the Contract" shall be submitted to arbitration. Clearly, any daim that Vulcan was negligent in connection [**29] with its performance under the contract falls within the arbitration clause.



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So ordered.

Footnotes

17 Pg. 5. For a discussion of the different standards to be applied in the doing business and transacting business tests, see Lumbermens Mutual Casualty Co. v. Borden Co., N.Y., 265 F. Supp. 99, Jan. 31, 1967.

Pg. 7. An examination of the legislative history of BCL § 307 and CPLR § 302 has failed to clearly support the contentions of either of the parties.

Pg. 9. Railex Corp. v. White Machine Co., 243 F. Supp. 381 (E.D.N.Y.1965). Central School District No. 2 v. C. R. Evans Co., 49 Misc. 924, 268 N.Y.S.2d 800 (Sup.Ct. 1966).

Pg. 26. Ohio Rev.Stat. § 2711.01; New York CPLR § 7501.



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